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STATE OF NORTH CAROLINA  
COUNTY OF ONSLOW

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
17 EDC 00447, 17EDC00677

<p>██████ by parents or guardians ██████ and ██████ Petitioner,</p> <p>v.</p> <p>Onslow County Board of Education Respondent.</p>	<p><b>FINAL DECISION</b></p>
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**THIS MATTER** was heard before the undersigned Honorable Stacey B. Bawtinheimer, Administrative Law Judge presiding, on the following dates: March 14-17, March 27-29, April 5-7, May 11-12, and May 15-16, 2017, at the Train Depot, 421 Court St., Jacksonville, North Carolina. After hearing the evidence presented and considering the written and oral arguments of counsel, the Undersigned is of the opinion that Respondent has not denied Petitioner ██████ a free and appropriate public education.

**APPEARANCES**

For Petitioners: Ann Paradis  
The Law Office of Ann Paradis  
301 Kilmayne Drive, Suite 102  
Cary, NC 27511

For Respondent: Carolyn A. Waller  
Maura O'Keefe  
Tharrington Smith, L.L.P.  
150 Fayetteville Street, Suite 1800  
Raleigh, NC 27602

**WITNESSES**

For Petitioners: ██████ MS, CCC/SLP  
██████ LCAW, MSW  
██████ Board Certified Behavior Analyst ("BCBA")  
██████ Director  
██████ Teacher  
██████ Petitioner and mother of ██████

For Respondent:

Autism Specialist, BCBA

MS, CCC/SLP

Special Education Teacher

Elem. Sch.

Regular Education Teacher

Elem. Sch.

## EXHIBITS

The following exhibits were received into evidence during the course of the hearing and have been retained as part of the official record of this contested case.

**Stipulated Exhibits ("Stip. Ex."): 1-6, 9, 11, 17, 19-27, 29-44, 47, 50-51, 54, 58-62, 65, 67, 75, 77-78, 81, 83-84, 86-88, 90, 92 (audio clip from 5:00-5:25; 29:30-34:20; 44:30-49:30; 2:07:30-2:17:20), 95-96, 100-101, 104-110, 117-118, 122, 127-130, 132, 134, 157-159, 166 (pp. 829-831), 165 (5:05-5:33), 167 (p. 878), 168 (pp. 886-889, 896, 901, 907-909, 910-916, 919, 921-922, 930, 933-936, 938, 950-952, 956, 964, 978, 982-983, 986, 992-994, 1019-1021, 1032, 1036-1037, 1040-1048, 1051-1053, 1068, 1090, 1092-1093, 1098-1099, 1101-1103, 1121-1123, 1137-1139, 1111), 169 (pp. 1145-1146, 1212, 1267-1269, 1334-1337, 1359-1372, 1574-1587, 1609-1613, 1661, 1668, 1675, 1681-1682, 1706), 170 (pp. 1774-1778 only), 171.**

**Petitioners' Exhibits ("Pet. Ex."): 2 (p. 3), 3-4, 10, 12, 18, 23, 26-30, 34-35, 37-40, 42-44, 61-62, 64-65, 66 (pp. 526-542, 544-551), 68, 71 (pp. 690, 709, 716-751, 753-54, 763-764), 74, 76-79, 82, 90, 93.**

**Respondents' Exhibits ("Resp. Ex."): 1 (pp. 25-27, 31-32, 35, 57-58, 76-77, 81-82), 3 (audio clip from 03:38-03:36, 04:49-05:48); 4 (audio clip from 00:25-03:44); 8 (pp. 249-250, 291, 293, 326-327, 400, 402-413, 439-440, 457-459, 461, 463, 468, 470-471), 12, 15, 18 (pp. 585-590, 593-595, 627-628, 673-674, 690-703, 718-719).**

**Offer of Proof:** Stip. Ex. 170, p. 1772. The Offer of Proof was not received into evidence but has been retained as a separate document separate within the official record for review purposes if necessary.

## ISSUES

The parties identified the issues for hearing in the Pre-Trial Order. At the close of Petitioners' case-in-chief, Respondent moved pursuant to Rule 41(b) for dismissal of the case. In a written order following Respondent's motion for dismissal under Rule 41(b), the Undersigned dismissed the "Child Find" claim.

In the same order, the Undersigned defined the remaining issues for hearing as follows:

- I. Whether the IEPs developed and reviewed for [REDACTED] on February 2 and February 25, 2016<sup>1</sup> were appropriate, and if not, whether any such failure led to a denial of FAPE for [REDACTED] (“IEP Issue”);
- II. Whether the Board failed to implement the February 2, 2016 and February 25, 2016 IEPs, and if so, whether any such failure denied [REDACTED] a FAPE (“Implementation Issue”);
- III. If Respondent did deny [REDACTED] a FAPE in a. or b. above, whether [REDACTED] is a placement reasonably calculated to provide educational benefit for [REDACTED] that supports an award of tuition and travel reimbursement (“Private School Issue”); and,
- IV. If Respondent did deny [REDACTED] a FAPE in a. or b. above, whether an award of compensatory education is appropriate (“Compensatory Education Issue”).

### **BURDEN OF PROOF**

Petitioners acknowledged in the Prehearing Order entered on March 14, 2017, that they have the burden of proof in this contested case. Stip. 91-92. The standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-34(a). North Carolina provides that actions of local boards of education are presumed to be correct and “the burden of proof shall be on the complaining party to show the contrary.” N.C. Gen. Stat. § 115C-44(b). The Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that Respondent did not provide [REDACTED] a free appropriate public education.

### **Procedural Background**

1. On May 6, 2016, [REDACTED] and [REDACTED] filed a Petition against the Onslow County Board of Education (“OCS”, “Respondent” or “Board”) alleging violations of the Individuals with Disabilities in Education Act (“IDEA”). This initial petition was declared insufficient by order of this Tribunal on May 17, 2016.

2. Petitioners subsequently filed an Amended Petition for Contested Case Hearing (“Amended Petition”), 16-EDC-4738, on July 15, 2016, alleging violations of the Individuals with Disabilities in Education Act including failure to timely identify [REDACTED] as a student with special needs and failure to properly implement his program once he was identified in January of 2016.

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<sup>1</sup> Two IEP meetings were held on February 2 and February 24, 2016. The IEP developed at the February 2 IEP meeting initial implementation date was February 8, 2016. The IEP developed at the February 24 IEP initial implementation date was February 25, 2016. For purposes of this decision and the issues, they are identified as the IEPs developed and reviewed on February 2 and February 25, 2016.

3. This case was initially scheduled for hearing on September 14, 2016, but was twice continued at the request of the parties, primarily on the basis that both parties were actively engaged in discovery. This Tribunal ultimately scheduled the hearing to begin on January 26, 2017.

4. On January 6, 2017, the matter was reassigned to the Honorable Stacey B. Bawtinheimer by Chief Administrative Law Judge Julian Mann, III.

5. On January 23, 2017, the parties held a pre-hearing conference during which counsel for the Respondent indicated that they would object to the introduction of any evidence at hearing challenging the appropriateness of [REDACTED] IEP, on the grounds that this allegation was not made in the Amended Petition. Later that day, Petitioners filed a Third Petition, 17-EDC-0047, in which they alleged for the first time that the IEPs developed for [REDACTED] were inappropriate. Petitioners also filed a Motion to Consolidate 16-EDC-4738 and 17-EDC-0447.

6. On January 25, 2017, Petitioners filed a Notice of Voluntary Dismissal with Prejudice of the Amended Petition, 16-EDC-4738, thereby rendering their Motion to Consolidate moot.

7. On February 2, 2017, Petitioners filed a Fourth Petition, 17-EDC-0677, in which they incorporated by reference the insufficient petition filed in May 2016 and the Amended Petition filed in July 2016. Petitioners also filed a Motion to Consolidate the Fourth Petition and the Third Petition, 17-EDC-0447. This Tribunal granted the Motion to Consolidate matters 17-EDC-0447 and 17-EDC-0677 on February 8, 2017.

8. The matter was scheduled for hearing on March 14, 2017.

9. The hearing in this matter began on March 14, 2017, and ended on May 16, encompassing fourteen (14) days of hearing.

## STIPULATIONS

The parties proposed an Order on the Final Pre-Trial Conference, which was approved and filed in the Office of Administrative Hearings on February 20, 2017.

The parties stipulated to the following stipulated facts:<sup>2</sup>

### Jurisdictional, Party, and Legal Stipulations

1. The Petitioners and Respondent named in this action are properly before this Tribunal, and that this Tribunal has personal jurisdiction over them.

2. Petitioners and Respondent named in this action are correctly designated.

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<sup>2</sup> The introduction of each stipulated fact which states "It is stipulated that..." has been removed for readability.

3. Petitioners are currently domiciled outside the boundaries of Onslow County.
4. As the party seeking relief, the burden of proof for this action lies with Petitioners. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
5. Petitioners have the burden of proof by the preponderance of the evidence. N.C. Gen. Stat. 150B-34(a).
6. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapter 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, and implementing regulations 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat 115C-109.6(a) control the issues to be reviewed.
7. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.
8. Respondent is a local education agency receiving monies pursuant to the IDEA.
9. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations, including the Policies Governing Services for Children with Disabilities.
10. Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.
11. Petitioners are seeking compensatory education for their claim that Respondent failed to timely and appropriately evaluate and identify [REDACTED] as a child with a disability under the IDEA, failed to offer him an appropriate IEP, and failed to implement the IEPs.
12. Petitioners' request for private school reimbursement is limited to the period of time in which [REDACTED] was enrolled at [REDACTED] from April-June, 2016.
13. Petitioners are seeking travel reimbursement from their place of residence to and from [REDACTED] for the time period of April-June of 2016, as well as for the period of time from July 2016 when school resumed until October 26, 2016, a period of time in which Petitioners allege they continued to reside within the jurisdiction of the Onslow County Schools.
14. Petitioners are not seeking reimbursement for costs and expenses of any alleged homeschooling expenses for October 15, 2015 through February 9, 2016.
15. Petitioners are not raising any claims regarding occupational therapy, the OCS' occupational therapy evaluation conducted in January 2016, or the occupational therapy services provided to [REDACTED] after the development of his IEP on February 2, 2016.

### Factual Stipulations

16. Petitioner [REDACTED], and that [REDACTED] mother is Petitioner [REDACTED]

[REDACTED] ( [REDACTED] and [REDACTED] father is Petitioner [REDACTED] )

It is stipulated that Petitioner [REDACTED] was six (6) years old at the time of the filing of this petition.

17. Petitioner [REDACTED] resides with [REDACTED] mother and father at [REDACTED]

18. The period of time at issue in this matter is the 2015-2016 school year, when [REDACTED] was five years old and enrollment at various times throughout the year in kindergarten in the Onslow County Schools.

19. The following persons served in the following roles at [REDACTED] during the pertinent times of this petition:

- a. [REDACTED] Principal
- b. [REDACTED] Assistant Principal
- c. [REDACTED] s General Education Teacher
- d. [REDACTED] s Exceptional Children's Teacher
- e. [REDACTED] Special Education Teacher
- f. [REDACTED] Data Manager
- g. [REDACTED] classroom assistant

20. The following persons served in the following roles at [REDACTED] during the pertinent times of this petition:

- a. [REDACTED] Principal
- b. [REDACTED] s Regular Education Teacher
- c. [REDACTED] Guidance Counselor and 504 Coordinator

21. [REDACTED] a.k.a. [REDACTED] is the Director of Exceptional Children's Services for Respondent

22. [REDACTED] is Respondent's School Psychologist who conducted [REDACTED] s psychoeducational evaluation in January 2016.

23. [REDACTED] is Respondent's Speech and Language Pathologist who conducted [REDACTED] s SLP evaluation in January 2016.

24. [REDACTED] is Respondent's Occupational Therapist who conducted [REDACTED] OT evaluation in January 2016.

25. [REDACTED] is an EC Instructional Coach for Respondent.

26. On April 8, 2014, [REDACTED]'s psychologist Dr. [REDACTED] conducted a Psychodiagnostic Interview based on a referral from [REDACTED] due to complaints of [REDACTED] behavior at a private preschool. Stip. Ex. 32, but reported the following diagnostic impressions:

- a. AXIS I: Adjustment Disorder with Mixed Disturbance of Emotions and Conduct;  
RULE OUT: ADHD, Combined Type  
RULE OUT: Disruptive Behavior Disorder
- b. AXIS II: None
- c. AXIS III: None
- d. AXIS IV: Struggling with Peers and Behavior in School

Stip. Ex. 32, p. 184.

27. On September 8, 2014, Petitioner [REDACTED] filled out a pre-school screening form and indicated that [REDACTED]'s preK-3 and preK-4 teachers from Infant of Prague, a private preschool program, recommended a psychological evaluation and an EC screening. Stip. Ex. 1. It is further stipulated that Petitioner [REDACTED]'s homeschool district within the Onslow County Schools, as indicated on the form, was [REDACTED] ([REDACTED] Elementary). Stip. Ex. 1.

28. On September 24, 2014, [REDACTED] filled out a Preschool Social, Medical and Developmental Questionnaire in which she indicated that her primary developmental concern for [REDACTED] is "hyperactive, bored, gets in trouble, other teachers refused to have him, he gets on everyone's "nerves;" that the following medical concerns apply to [REDACTED] Asthma, Attention Deficit, PDD-NOS, Autism, Failure to Thrive, Repetitive Movements, Sensory Integration, and Stomach Problems; that in response to the question whether [REDACTED] has received any medical diagnosis, she responded "Asthma;" that when asked if [REDACTED] plays appropriately with his peers, she responded, "no, fights, argues;" that she reported [REDACTED] received behavior therapy; that [REDACTED] is no longer in preschool because "teacher refused [REDACTED];" that in response to the question, "Do other family members, caregivers, or teachers report any behavioral or learning problems," she responded, "everyone;" that in response to the question, "What is your most pressing priority for your child over the next year, she responded, "help [REDACTED] follow protocol, get along, sit, listen, be understood, be around people who can treat [REDACTED] with a caring friendly manner;" that in response to the question, "Is there anything else you would like to share about your child?" she responded, "Prob. Aspergers/Autism/ADHD, repeats self, bounces all day, can't sit still, teachers don't want him in their class." Stip. Ex. 3.

29. On October 2, 2014, Petitioner [REDACTED] attended a pre-school referral meeting for [REDACTED] Stip. Ex. 5. It is further stipulated that during the meeting, Petitioner [REDACTED] reported behavioral concerns, Asperger/Autism and ADHD, as well as a diagnosis of ADHD and ODD, and indicated that she did not agree with the ODD diagnosis. Stip. Ex. 5.

30. During this meeting, the team reviewed the Psychodiagnostic Interview completed by Dr. [REDACTED] on April 8, 2014. Stip. Ex. 5, p. 17.

31. The pre-school team decided to conduct evaluation to determine if [REDACTED] was eligible for special education and related services, and that as part of this evaluation, information was needed in the following areas: physical health, educational, psychological to include intellectual

assessment, social appraisal, speech/language, adaptive behavior, autism, observations. Stip. Ex. 5, p. 17-18.

32. On November 25, 2014, Petitioner [REDACTED] cancelled Petitioner [REDACTED] referral for Exceptional Children's services. Stip. Ex. 6.

33. [REDACTED] was invited to an IEP meeting on December 1, 2014 to discuss her request to stop the process of evaluating [REDACTED] Stip. Ex. 156.

34. Respondent provided Petitioners with a Prior Written Notice from the December 1, 2014 IEP meeting, which indicated that two Invitations to Conference were sent to [REDACTED] that a home visit was conducted to obtain in writing [REDACTED]'s decision to terminate the referral process for [REDACTED] that [REDACTED] reported that [REDACTED] was doing well at [REDACTED] current preschool, EXCEL, and that [REDACTED] no longer had concerns that warranted finishing the evaluation process. Stip. Ex. 157.

35. Petitioner [REDACTED] attended enrollment at [REDACTED] on May 5, 2015. It is further stipulated that at that time, Petitioner [REDACTED] filled out an enrollment form for Petitioner [REDACTED] Stip. Ex. 17.

36. [REDACTED] [REDACTED] nurse, and [REDACTED] [REDACTED] data manager, were present at enrollment on May 5, 2015.

37. The notation on the right-hand margin of [REDACTED]'s enrollment form – which reads “ADHD,” “ODD,” and “Asperger's” – was made by [REDACTED] Stip. Ex. 17.

38. [REDACTED] attended [REDACTED] from the beginning of the 2015-2016 school year until he was withdrawn on September 8, 2015, by Petitioners [REDACTED] and [REDACTED]

39. On September 2, 2015, an incident occurred with [REDACTED] while waiting in line to board a school bus outside [REDACTED] Elementary, and that this incident led to a “Teacher Discipline Report” being filled out by [REDACTED] teacher, [REDACTED] which indicated that [REDACTED] “got very physical with me (hitting, kicking, biting).” Stip. Ex. 20.

40. The Teacher Discipline Report for this incident reflects that Ms. [REDACTED] “picked up [REDACTED] to prevent [REDACTED] from harming [REDACTED] self and [REDACTED] teacher,” and that [REDACTED] was escorted from the bus lot. Stip. Ex. 20.

41. A Physical Restraint Documentation Form was filled out [REDACTED] in which she reports two physical restraints that she performed on [REDACTED] after the incident in the bus lot, and in which she states, “[REDACTED] calmed down within 30 seconds both times.” It is further stipulated that the form reflects that teacher assistant [REDACTED] was witness to some of the behavioral incident. Stip. Ex. 19

42. On September 3, 2015, special education teacher [REDACTED] asked Petitioner [REDACTED] if she would like to pursue a referral for eligibility for special education services, and [REDACTED] indicated that she would like to pursue that referral.



43. [REDACTED] attended school on September 4, 2015 only briefly, as [REDACTED] removed [REDACTED] from school that day in the morning. It is further stipulated that Petitioner [REDACTED] final day of attendance at [REDACTED] during the fall semester was September 4, 2015.

44. The acronym CECAS stands for Comprehensive Exceptional Children's Accountability System and is a case management and data analysis system that is used by Onslow County Schools.

45. Petitioner [REDACTED] filled out an enrollment form for [REDACTED] to enroll at [REDACTED] [REDACTED] (" [REDACTED] on September 11, 2014. Stip. Ex. 24. It is further stipulated that [REDACTED] was enrolled at [REDACTED] from September 14, 2015 until October 15, 2015. Stip. Ex. 7.

46. [REDACTED] indicated asthma as a health issue or concern on [REDACTED] [REDACTED] registration form.

47. After a behavioral incident on September 30, 2015 that led to [REDACTED] throwing permanent paint in the main conference room and causing approximately \$1,100.00 worth of damage, Petitioner [REDACTED] was called to retrieve [REDACTED]. It is stipulated that when [REDACTED] arrived at the school, she spoke with Principal [REDACTED] and was introduced to [REDACTED] school guidance counselor and 504 coordinator.

48. On Thursday, October 1, 2015, Petitioner [REDACTED] informed Ms. [REDACTED] via email requesting an appointment "to get a 504 started." Stip. Ex. 28. [REDACTED] further indicated that she was not comfortable providing a medical release but that she would bring in his diagnoses papers. *Id.*

49. [REDACTED] [REDACTED]s classroom teacher at [REDACTED] filled out a Section 504 Student Referral form, dated Thursday, October 8, 2015. Stip. Ex. 34.

50. On October 8, 2015, an Invitation to Team Meeting for a 504 Initial Meeting was issued to Petitioners, proposing a meeting for Monday, October 19, 2015. Stip. Ex. 36. It is further stipulated that [REDACTED] signed this Invitation on October 12, 2015, indicating both she and [REDACTED] would attend this meeting.

51. Petitioner [REDACTED] also signed a Section 504 Parent Consent for Initial Evaluation consent form, dated Monday, October 12, 2015. Stip. Ex. 39.

52. A Teacher Discipline Report to Administration was submitted for an incident with [REDACTED] on October 15, 2015 that occurred on the bus when he was returning from a field trip. Stip. Ex. 42.

53. Another incident occurred on October 15, 2015 in the multi-purpose room while students were waiting for carpool at dismissal, and an Administrative Discipline Report to the Parent indicates that [REDACTED] received a two-day out-of-school suspension for this incident. Stip. Ex. 41.

54. [REDACTED] final day of attendance at [REDACTED] was October 15, 2015.

55. On October 16, 2015, Petitioners were told by [REDACTED] Principal [REDACTED] via email, that they discovered that morning that they did not reside, nor had they ever resided, at the address Petitioners used to register [REDACTED] at [REDACTED] and that [REDACTED] would be unable to return to [REDACTED] unless they provided valid proof of residency. Stip. Ex. 168, p. 980.

56. The 504 meeting scheduled for October 19, 2016, was not held, as [REDACTED] was disenrolled from [REDACTED]. It is further stipulated that, as a result, 504 eligibility was never determined, nor was a 504 Plan finalized.

57. Petitioner [REDACTED] submitted a handwritten letter of complaint on November 3, 2015, regarding the behavioral incident involving [REDACTED] at [REDACTED] on October 15, 2015. Stip. Ex. 44.

58. [REDACTED] spoke with [REDACTED] on November 5, 2015 on the phone to discuss her concerns. Stip. Ex. 149 pp. 698-703.

59. Petitioners never registered as a homeschool with the North Carolina Department of Public Instruction.

60. Petitioners [REDACTED] and [REDACTED] received an invitation to conference dated December 9, 2015, to attend a special education referral meeting on December 18, 2015. It is further stipulated that the invitation to conference indicated that the purpose of the meeting was to "[d]iscuss special education referral for initial evaluation or reevaluation determination." Stip. Ex. 52.

61. Petitioners [REDACTED] and [REDACTED] attended the special education referral meeting on December 18, 2015. Stip. Ex. 50.

62. Petitioners were represented by counsel at the December 18, 2015 IEP referral meeting. It is further stipulated that counsel for the Board was not present.

63. The IEP team on December 18, 2015 decided to conduct formal testing to determine if [REDACTED] was a student with a disability under the classifications of Developmental Delay, Autism, or Other Health Impaired. Stip. Ex. 51.

64. The team determined that the following information was needed to determine if [REDACTED] was or was not eligible for special education services: "vision and hearing screenings, conferences or contacts with parents, educational and psychological evaluations to include IQ testing, adaptive testing, a speech/language evaluation including pragmatics and semantics, a behavioral and emotional evaluation to include characteristics of Autism, a social developmental history, observation across settings, a health screening required for DD, a motor screening, and two researched based interventions. Stip. Ex. 50, p. 218. It is stipulated that the testing started immediately during the meeting on December 18, 2015 with the hearing and vision screening.

65. On January 4, 2016, school psychologist [REDACTED] conducted a psychological evaluation of [REDACTED]. Stip. Ex. 61.

66. On January 14, 2016, speech language pathologist [REDACTED] conducted a speech/language evaluation of [REDACTED] Stip. Ex. 58.

67. On January 25, 2016, occupational therapist [REDACTED] conducted an occupational therapy evaluation of [REDACTED] Stip. Ex. 62.

68. The IEP team, including both Petitioner [REDACTED] and [REDACTED] met on February 2, 2016.

69. Petitioners were represented by counsel at the February 2, 2016 IEP meeting. It is further stipulated that counsel for the Board was not present.

70. At the February 2, 2016 IEP meeting, the team determined that Petitioner [REDACTED] was eligible for special education and related services and met the eligibility criteria for Autism and Other Health Impairment. Stip. Ex. 67, p. 313. It is further stipulated that during this meeting, the team developed an initial IEP and Behavior Support Plan, both effective on February 8, 2016. Stip. Exs. 81, 65-70

71. The IEP developed on February 2, 2016 indicates that [REDACTED] has behavior that interferes with [REDACTED] learning, and that [REDACTED] behavior will be addressed through a behavior goal and a behavior support plan. Stip. Ex. 81, p. 401.

72. [REDACTED] functional goal in his February 2, 2016 IEP was as follows: "When [REDACTED] becomes upset, frustrated, or angry, he will use self-regulation/coping strategies (movement breaks, deep breathing, quiet space, deep pressure/heavy work activity, etc.) to avoid engaging in an aggressive or non-compliant behavior, with two or fewer verbal or visual reminders, on 4 out of 5 opportunities. Stip. Ex. 81, p. 402.

73. The service delivery in the IEP developed on February 2, 2016, was as follows (Stip. Ex. 81, p. 408):

Type of Service	Sessions	Time per Session	Location of Services
Social/emotional skills	5 per week	20 minutes	Exceptional Children Classroom
Occupational Therapy (support description)	7 per reporting period	Unidentified amount of time	Total School Environment

74. The Behavior Support Plan developed on February 2, 2016, included CPI restraint as an intervention strategy for the peak phase of the escalation cycle. Stip. Ex. 65.

75. Petitioners re-enrolled [REDACTED] at [REDACTED] on February 9, 2016. Stip. Ex. 82.

76. Petitioners [REDACTED] and [REDACTED] received a copy of the Prior Written Notice from the February 2, 2016 IEP meeting. Stip. Ex. 74.

77. An IEP meeting was held on February 24, 2016, during which the team amended the Behavior Support Plan. Stip. Ex. 88. It is further stipulated that at this meeting, the team obtained consent from Petitioners [REDACTED] and [REDACTED] to conduct a Functional Behavioral Assessment. Stip. Ex. 89.

78. [REDACTED]'s behavior goal and service delivery from the February 2, 2016 IEP were not changed in the February 24, 2016 IEP. Stip. Ex. 96, pp. 454, 461.

79. When describing how the goal was to be measured in the February 2, 2016 and the February 24, 2016 IEPs, the IEPs state "frequency/anecdotal notes". Stip. Ex. 80, p. 402; Stip. Ex. 96, p. 454.

80. The team added as an accommodation/modification that stated, "during this time of transition to the school setting, intensive support is required in all school environments." Stip. Ex. 96, p. 456. It is further stipulated that at this meeting, the Behavior Support Plan was amended to include more detail on how to de-escalate behaviors. Stip. Ex. 88.

81. On each of the following dates, [REDACTED] Exceptional Children teacher [REDACTED] implemented a restraint, as called for by [REDACTED] Behavior Support Plan: February 18, 2016 (Stip. Ex. 84); March 7, 2016 (St. Ex. 100, 101); and March 18, 2016 (Stip. Ex. 104).

82. On March 22, 2016, when Ms. [REDACTED] brought [REDACTED] to his classroom Ms. [REDACTED] requested that she remove [REDACTED]'s watch.<sup>3</sup>

83. EC Director [REDACTED] also informed Petitioners that [REDACTED] was not allowed to wear that particular watch during school.

84. In a letter dated March 22, 2016, Respondent informed Petitioner [REDACTED] that she was not permitted to be present on the [REDACTED] Campus except through the designated student drop off/pick up area in accordance with school procedures. Stip. Ex. 118.

85. Petitioner [REDACTED]'s last day of school at [REDACTED] Elementary was March 24, 2016.

86. On March 31, 2016, Ms. [REDACTED] interviewed Petitioner [REDACTED] via telephone to obtain information for [REDACTED]'s Functional Behavior Assessment. Stip. Ex. 122, p. 509.

87. A meeting [REDACTED] scheduled for April 6, 2016, at which time the parties planned to review and finalize the Functional Behavioral Assessment and develop a Behavior Intervention Plan as well as discuss concerns of the parents.

88. On April 5, 2016, counsel for Petitioners notified counsel for the Board that Petitioners were cancelling the meeting the following day and withdrawing [REDACTED] from [REDACTED]. Stip. Ex. 170, p. 1784.

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<sup>3</sup> The watch [REDACTED] wore at school could be used as a phone and permitted [REDACTED] to call his parents.

89. Petitioners [REDACTED] and [REDACTED] enrolled [REDACTED] at [REDACTED] on April 11, 2016. It is further stipulated that [REDACTED] has attended [REDACTED] since that time.

90. On May 25, 2016, Respondent issued an IEP progress report that reported on [REDACTED]'s progress in his social skills lessons with Ms. [REDACTED]. It is further stipulated that the report reflects that [REDACTED] "does very well" applying select strategies in his social skills sessions, but "ha[d] not been successful when generalizing these strategies across the environment to self-regulate his behavior even when provided verbal or visual [cues] during the escalation cycle." Stip. Ex. 127.

## FINDINGS OF FACTS

At the start of the hearing in this matter, the parties agreed to Jurisdictional, Party, and Legal Stipulations and Factual Stipulations in a proposed Pretrial Order, which was approved and filed in the Office of Administrative Hearings on March 15, 2017.

This Order incorporates and reaffirms all findings of fact and conclusions of law contained in previous Orders entered in this litigation.

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for determining credibility, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with other believable evidence in the case, including but not limited to verbal statements at IEP meetings, IEP meeting minutes, IEP documents, DEC 5/Prior Written Notices, and all other competent and admissible evidence.

Based upon the stipulations of record and the preponderance of admissible evidence, the Undersigned finds as follows:

### ***General Findings***

#### *Overview*

1. The parents' primary concern in this case is the appropriateness of the behavioral supports that [REDACTED] received pursuant to his IEPs and Behavioral Support Plans, particularly the use of CPI holds ("Crisis Prevention Institute" now known as "Nonviolent Crisis Intervention")<sup>4</sup> which the parents vehemently opposed.

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<sup>4</sup> Physical restraint is defined as "the use of physical force to restrict the free movement of all or a portion of a student's body." N.C.G.S. § 115-391.1(b)(8). Physical restraint is considered a reasonable use of force when reasonably needed to secure the safety of any student, school

2. The Undersigned makes no findings of fact or conclusions of law with respect to the Petitioners' allegations of abuse or neglect by OCS or OCS staff regarding the use of CPI holds and/or other physical restraints.

3. Although [REDACTED] and [REDACTED]'s concerns about [REDACTED]'s safety and well-being are reasonable parental concerns, their allegations of abuse in this matter and other examples polarized the parties rather than fostered cooperation towards the provision of a free and appropriate public education ("FAPE") for [REDACTED].

4. [REDACTED] is a child with Autism, impulsivity and sensory deficits whose perceptions were impacted by [REDACTED] disabilities. Even though [REDACTED] may have believed the truth in [REDACTED] recollections, his private BCBA recognized that his perceptions of [REDACTED] actions and those of others was misconstrued.

5. While [REDACTED] and [REDACTED] may be frustrated with this process, the Undersigned's focus is decidedly narrow under the IDEA. Did OCS offer [REDACTED] an IEP reasonably calculated to enable [REDACTED] to make progress appropriate in light of [REDACTED] circumstances and provide a cogent and responsive explanation for their decisions.

6. Petitioners' concerns include the appropriateness of [REDACTED]'s behavioral and pragmatic language needs, the appropriateness of [REDACTED]'s IEPs and BSPs, the implementation the IEPs and BSPs including the use of CPI holds, staff training, and data collection.

7. During the Fall semester of his kindergarten 2015/2016 school year, [REDACTED] attended OCS from August 2015 to September 8, 2015 at [REDACTED] and September 14, 2015 to October 15, 2015 at [REDACTED] for a period of approximately 2 months.

8. During the Spring semester of the 2015/2016 school year, [REDACTED] sporadically attended school from February 9 to February 24, 2016, only 10 days (2 full and 8 partial); from February 25, to March 23, 2016, only 14 days (11 full and 3 partial), a period of approximately 5 weeks.

9. At most, [REDACTED] attended 3 ½ months of [REDACTED] kindergarten school year at OCS during the 2015/2016 school year.

10. On every occasion when Petitioners withdrew [REDACTED] from OCS, Petitioners alleged that OCS staff were physically abusing [REDACTED] because they used a CPI hold.

11. According to school staff none of these CPI holds lasted more than 30-60 seconds or caused any physical injury to [REDACTED] but were necessary for the safety of other students, school staff, and [REDACTED].

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employee, to calm or comfort a student, or to prevent self-injurious behavior, N.C.G.S. 115-391.1(c)(1)(d), and/or if used as provided for in a student's IEP, Section 504 Plan or BIP. N.C.G.S. § 115.391.1(c)(1)(f).

12. After [REDACTED] accused EC Director [REDACTED] (a.k.a. [REDACTED]) of assaulting her on March 18 and school staff of abusing [REDACTED] multiple times during the Fall semester, [REDACTED]'s parents removed him from Respondent's schools and placed him in a private placement, [REDACTED]. Even though at [REDACTED] continues to exhibit the same maladaptive behaviors, Petitioners are seeking reimbursement for the private placement as well as compensatory education for alleged denials of FAPE by Respondent.

### **Witnesses at the Hearing**

#### ***Petitioners' Expert Witness***

[REDACTED] MS, CCC/SLP

13. Petitioners called [REDACTED] as an expert in the case. Ms. [REDACTED] was qualified as an expert in Crisis Prevention Institute ("CPI") training and implementation; behavior, social, and communication support needs for student with autism, and instructional support for those domains; and IEP development and goals for students with autism. Tr. Vol. 1, p. 69:10-18. She has a Bachelor's degree in Speech and Communications in Psychology (1980), a Master's degree in Speech Language Pathology (1982), and worked toward her doctorate in early intervention of learning disabilities. Tr. Vol. 1, pp. 22:5-10, 23:2-3. She is trained in Applied Behavior Analysis ("ABA"), and took all the course work to become a Board Certified Behavior Analyst ("BCBA"). Tr. Vol. 1, p. 29:5-11. Ms. [REDACTED] is a senior level CPI instructor, and has completed the advanced content training and the autism specific training. Tr. Vol. 1, p. 34:5-8. She is trained to diagnose autism (Tr. Vol. 1, p. 31:21-22) and provides training on how to identify and assess and then plan programs for skill acquisition and behavior reduction. Tr. Vol. 1, p. 31:23-25. She conducts trainings for the North Carolina Department of Public Instruction on communication, ABA, and IEP goal writing. Tr. Vol. 1, p. 41:9-12. She has evaluated and provided school based services to thousands of students with autism over her 35 years in the field. Tr. Vol. 1, p. 40:6-22.

14. The Undersigned found Ms. [REDACTED] to be credible, knowledgeable, and well prepared to testify about the subject matter she was qualified as an expert. However, Ms. [REDACTED] was not aware of several key points with respect to the IDEA's requirements regarding FBAs, N.C. statutory authority for physical restraints, and NCDPI's requirements for pragmatic language evaluations.

15. Under the IDEA, a FBA is not required to develop a behavior goal, BSP, or BIP. According to State law physical restraints could be used for any student, special needs or not, if the student's behavior threatened the safety of the student or others. The NCDPI does not require a criterion reference pragmatic language evaluation for eligibility purposes. Ms. [REDACTED] opinions about the appropriateness of the IEP behavior goal, BSP/BIP, and pragmatic language evaluation were given little weight due to her misunderstanding of the relevant legal requirements with respect to these topics.

16. With respect her testimony about [REDACTED]'s progress in OCS and at [REDACTED] Ms. [REDACTED] was not aware that, prior to and after [REDACTED]'s enrollment in OCS, [REDACTED] had had significant behavioral problems at other school settings and that his parents had accused these

school personnel of physically abusing [REDACTED] Ms. [REDACTED] was also unaware of [REDACTED]'s sporadic attendance. Moreover, because Ms. [REDACTED] was not qualified as a clinical psychologist/psychiatrist or to diagnose Reflexive Condition Motivating Operation ("CMOR"), and she was unaware of [REDACTED]'s behavioral problems in other setting, her opinion that [REDACTED] regressed at OCS was given little weight.

#### ***Petitioner's Other Witnesses***

[REDACTED] LCSW

17. The Petitioners also called [REDACTED] LCSW, the therapist for Petitioner [REDACTED] and his family from June 3, 2014 until August 19, 2016. Tr. Vol. 4, p. 83:13-22. Ms. [REDACTED] provided [REDACTED] and his parents with support on school issues during the 2015-2016 school year. Tr. Vol. 4, pp. 95:25-96:2. Ms. [REDACTED] therapy notes contradicted [REDACTED]'s testimony in some respects. To the extent that Ms. [REDACTED] had accurate information about OCS services, the Undersigned found her testimony credible.

[REDACTED] BCBA

18. Ms. [REDACTED] is a Board Certified Behavior Analyst ("BCBA") employed by [REDACTED]. Vol. 4, pp. 139-140. She testified about her brief work (less than one week) as a behavior analyst providing ABA services to [REDACTED] Ms. [REDACTED] testified that she worked with Petitioners through the intake process in February, 2016, attended some IEP meetings and initial sessions with [REDACTED] but worked with the family only for a short period of time. *Id.*

19. Although Ms. [REDACTED] was a BCBA, had personally assessed and worked with [REDACTED] her opinions about the appropriateness of the behavior goal, BSP, FBA, and BIP were not solicited by the Petitioners. Ms. [REDACTED] was instructed by [REDACTED] during an IEP meeting not to provide information to the IEP team about her observations of the ABA home services. Ms. [REDACTED] testimony corroborated much of the OCS staff as to the events at the IEP meetings and issues pertaining to discussions/development of the FBA. Ms. [REDACTED] presented as a neutral, genuine witness and the Undersigned found her testimony helpful and credible.

[REDACTED] Director [REDACTED]

20. [REDACTED] Head of School for [REDACTED] testified about [REDACTED]'s progress at the school. She also testified about school staff's ongoing frustrations of working with [REDACTED] The Undersigned found Ms. [REDACTED] testimony credible and often contradictory to the testimony of [REDACTED]

[REDACTED] Teacher [REDACTED]

21. [REDACTED]'s teacher at [REDACTED] also testified about [REDACTED]'s progress at the school. The Undersigned found Ms. [REDACTED] testimony credible and often contradictory to the testimony of [REDACTED]



██████████ mother of ██████████

22. ██████████ mother of ██████████ also testified as a fact witness for the Petitioners. As the mother of ██████████ she has an explicit and implicit bias for the best interests of ██████████. In addition to her bias, ██████████ was hostile and evasive on cross-examination and had to be admonished multiple times to answer the School Board attorney's questions. Her prior accusations of abuse at ██████████ former school settings as well as at OCS, seemed sensational especially her accusation that OCS EC Director assaulted her by "bumping" into her. The Undersigned did not find ██████████ to be credible and reliable in her testimony in general.

### ***Respondent's Witnesses***

██████████

23. ██████████ has worked as an educator for Onslow County Schools since 2003. Tr. Vol. 13, p. 25. She holds an undergraduate degree in K-6 elementary education, and a master's degree in the area of reading. Tr. Vol. 13, pp. 25-26. Ms. ██████████ holds K-6 and special education licensures issued by the state of North Carolina; she has also obtained National Board Certification. Tr. Vol. 13, p. 26. Ms. ██████████ has worked as a special education teacher for nearly eight years, and has served as a special education teacher at ██████████ elementary for three years. *Id.* In addition to serving as a member of ██████████'s IEP team, Ms. ██████████ provided direct instruction to ██████████ on a near-daily basis. Ms. ██████████ testified that she had personally reviewed teacher documentation notes, anecdotal notes, and other notes describing behavioral incidents from ██████████'s prior enrollment at both ██████████ and ██████████. Based on her educational background, qualifications, experience, and personal interactions with Petitioners, the Undersigned finds Ms. ██████████ to be a credible witness as to the appropriateness and implementation of ██████████'s February 2 and February 25 IEPs and BSPs as well as her recollection of interactions with the Petitioners.

██████████

24. ██████████ has served as a teacher in Onslow County Schools for four years. Tr. Vol. 14, p. 22. Ms. ██████████ currently teaches a third and fourth grade class at ██████████. *Id.* at 21. For the last three years, however, Ms. ██████████ taught kindergarten at ██████████. *Id.* at 22. Ms. ██████████ holds an undergraduate degree in elementary education and is licensed in K6 elementary education. *Id.* Ms. ██████████ served as ██████████'s classroom teacher during ██████████'s brief initial period of enrollment, at the start of the 2015-2016 school year, and during his enrollment in February and March of 2016. *See* Tr. Vol. 14, pp. 23 & 25. Based on her educational background, qualifications, experience, and personal interactions with ██████████, the Undersigned finds Ms. ██████████ to be a credible witness with regard to the appropriateness and implementation of ██████████'s February 2 and February 25 IEPs and BSPs.

### ***Respondent's Expert Witnesses***

**Kerry [REDACTED] BCBA**

25. Kerry [REDACTED] a recently licensed BCBA who was previously employed by Respondent, was qualified as an expert in behavior management of students with autism and other special needs of students who have behavioral problems including the development of IEP behavior goals, behavior interventions plans, and functional behavior assessments, and applied behavior analysis ("ABA"). Tr. Vol. 11, p. 32:3-10. She was not involved with [REDACTED] until she conducted three observations of [REDACTED] in February and March 2016, but provided extensive testimony regarding [REDACTED]'s IEPs. Tr. Vol. 11, pp. 33:22-33:1. In her capacity as an "autism specialist" within the district, she was solely responsible for the entire district comprising thirty-seven schools. Tr. Vol. 11, pp. 8:25;131:16-132:1. The Undersigned found her testimony credible regarding the appropriateness of [REDACTED]'s IEPs and BSPs as well as the FBA process.

**[REDACTED] MS, CCC/SLP**

26. [REDACTED] a speech/language pathologist employed by the Respondent as the Related Services Lead, was qualified as an expert in the broad area of speech and language pathology, and the evaluation and assessment of children in the area of speech and language. Resp. Ex. 15; Tr. Vol. 12, p. 105:10-14. [REDACTED] is licensed by the State of North Carolina as a speech pathologist and also holds a national certification from the American Speech Language and Hearing Association ("ASHA"). Tr. Vol. 12, pp. 100-101. Ms. [REDACTED] has not worked with elementary aged students for eleven years. Tr. Vol. 12, p. 172:22-23. The information that she had about [REDACTED] was limited. *See e.g.*, Tr. Vol. 12, pp. 159:25-160:10 (testifying she did not review [REDACTED]'s file with the exception of limited speech/language evaluation documents, and did not review the Functional Behavior Assessment and Behavior Intervention Plan before that day), Tr. Vol. 12, p. 160:11-14 (did not meet or observe [REDACTED] and did not attend any IEP meetings or review Ms. [REDACTED] evaluation when it was conducted.), Tr. Vol. 14, pp. 160:25-161:8 (did not review [REDACTED]'s progress monitoring, ABC checklists, or anecdotal records). Ms. [REDACTED] testified primarily about the appropriateness of the pragmatic language evaluations conducted by Speech Pathologist Amy [REDACTED]. The Undersigned found Ms. [REDACTED] testimony credible and her testimony regarding NCDPI's requirement for pragmatic language evaluations and speech language evaluations in general most helpful.

27. Except as otherwise stated herein, overall the Undersigned found the witnesses' testimonies consistent with the educational records. Respondent's witnesses were afforded the applicable deference due their position based on their "demonstrated knowledge and expertise" with respect to the facts and inferences within the specialized knowledge of the witness. N.C. Gen. Stat. § 150B-34(a).

### **[REDACTED]'s Background**

28. [REDACTED] was five (5) years old kindergarten student at all times relevant to this case. [REDACTED] is currently seven (7) years old. Stip. 16.

*Preschool History 2012-2014*

29. [REDACTED] preschool history is detailed in findings of Fact ## 1- 61 in the Rule 41(b) Order, pp. 4-11, and are only discussed here to illustrate [REDACTED] ongoing behavioral issues and Petitioners' response.

30. [REDACTED] "struggled" in [REDACTED] Pre-K 3 classroom at Infant of Prague. See Tr. Vol. 6, p. 59.

31. During the following year in [REDACTED] PreK-4 classroom at Infant of Prague, [REDACTED] continued to struggle to the extent that [REDACTED] teacher advised [REDACTED] to pursue testing for [REDACTED] because of suspected Autism. Tr. Vol. 6, pp. 60-61; Vol. 7, pp. 59, 62-62, 81.

32. [REDACTED] was concerned that Infant of Prague staff were possibly triggering [REDACTED]'s noncompliance, and that this concern was "always in [her] mind as a possibility" regarding reports of [REDACTED]'s noncompliant behaviors. Tr. Vol. 7, p. 62 (testimony of [REDACTED]).

33. Around this same time, [REDACTED] parents alleged that Infant of Prague school staff were physically abusing [REDACTED] and his sister. See Tr. Vol 7, pp. 79-82. [REDACTED] wrote an email to the school indicating that she disagreed with their determination that the allegations were unfounded.

34. This was the Petitioners' first allegation of physical abuse of [REDACTED] by school staff.

35. Ms. [REDACTED] a licensed social worker who worked with [REDACTED] and the family, corroborated this, testifying that the parents expressed that same concern to her as well. Tr. Vol. 4, pp. 132-133.

36. Petitioner initiated then terminated the OCS referral process after they withdrew [REDACTED] from Infant of Prague and enrolled [REDACTED] in Excel 8, another private preschool program where they were satisfied.

37. [REDACTED] testified that, overall, [REDACTED] did well at Excel 8 because his preschool teacher had a psychology degree.

38. On the other hand, Ms. [REDACTED] testified that [REDACTED] had also expressed concerns about the staff at Excel 8, and reported that [REDACTED] has tantrums while enrolled there. Tr. Vol. 4, p. 133 (testimony of [REDACTED] Resp. Ex. 18, p. 628).

39. [REDACTED] behaved aggressively during Ms. [REDACTED] therapy sessions during the period he was enrolled at Excel 8, including kicking a trash can, hitting his sister and parents, and kicking and pushing Ms. [REDACTED] herself. Tr. Vol. 4, pp. 129-130 (testimony of [REDACTED]).

**2015-2016 School Year**

40. Petitioner [REDACTED] registered [REDACTED] at [REDACTED] on May 5, 2015 for the 2015-2016 school year. Finding of Fact 10, Rule 41(b) Order.

41. On September 2, [REDACTED] staff members implemented CPI holds in response to [REDACTED]'s aggressive behaviors in the bus line and in the school building. Stips. 39-41.

42. Petitioners subsequently alleged that [REDACTED] had been choked during a CPI hold. Tr. Vol. 7, pp. 125-126.

43. This was the Petitioners' second allegation of physical abuse of [REDACTED] by school staff.

44. [REDACTED] spoke with the staff members who implemented the CPI holds with [REDACTED] on September 2, all of whom reported that [REDACTED] had not been choked or struggled to breathe during the September 2 incident. Tr. Vol. 7, pp. 152-153.

45. [REDACTED] was the only person to report that he had been choked. Tr. vol. 7, p. 152. [REDACTED] stated that her [REDACTED] "does not lie" and refused to believe the [REDACTED] staff. Stip. Ex. 21.

46. Petitioner complained to school administration about the purported abuse at [REDACTED] and were dissatisfied with the administrators' response. Stip. Exs. 21, 22, 27, 44.

47. On October 15, 2015 [REDACTED] accused a teacher assistant [REDACTED] of laying her full body weight on [REDACTED] while Principal [REDACTED] hovered over top of him, to the extent that [REDACTED] "had to dig in between the bodies and pull him out." Stip. Ex. 44, p. 203. Like they had at Infant of Prague after the allegation of abuse, [REDACTED]'s parents subsequently withdrew [REDACTED] from [REDACTED]

[REDACTED]

48. [REDACTED]'s parents then fabricated their residency as being within the attendance zone for [REDACTED] ("[REDACTED]" and enrolled [REDACTED] and his sister at [REDACTED] using the false address. Finding of Fact 33, Rule 41(b) Order.

49. [REDACTED] decided to pursue a 504 plan for [REDACTED] rather than an IEP, and she provided school psychologist [REDACTED] with written documentation of [REDACTED]'s diagnosis of autism. Findings of Fact 35, 37, & 39, Rule 41(b) Order.

50. This was the first documentation received by OCS indicating that [REDACTED] had been diagnosed with ADHD and Autism Spectrum, conditions that could qualify [REDACTED] as a student with a disability. Finding of Fact 40, Rule 41(b) Order.

51. On October 15, 2015, two behavioral incidents occurred at [REDACTED] that required CPI holds. Stips. 52 & 53.

52. Petitioners subsequently alleged that [REDACTED] staff had abused [REDACTED] See Tr. Vol. 6, p. 129.

53. This was the Petitioners' third allegation of abuse of [REDACTED] by school staff.

54. Petitioners were informed by [REDACTED] administration that as they were not legally domiciled in the district for that school, they would be unable to return to [REDACTED] unless they provided valid proof of residency. Stip. 56.

55. Petitioner [REDACTED] did not initially re-enroll [REDACTED] back into [REDACTED] after deciding not to return to [REDACTED] because, according to [REDACTED] they were fearful of [REDACTED]'s safety at [REDACTED] Ms. [REDACTED] could not guarantee [REDACTED] safety, and she was concerned about staff having the necessary skills to have a child like her [REDACTED] and help [REDACTED] be successful in school. Tr. Vol. 6, p. 144:9-23 (testimony of [REDACTED])

56. [REDACTED] also had concerns about the EC staff at [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] after hearing what she considered inappropriate communications they had with another student.

#### **Special Education IEP Referral**

57. On November 3, 2015 [REDACTED] engaged in a telephone conversation with EC Director [REDACTED] that was sufficient to invoke the Respondent's child find obligation. Findings of Fact 53, 59, Rule 41(b) Order.

58. Although Petitioners reported to OCS staff that they were homeschooling [REDACTED] after his withdrawal from [REDACTED] they never registered as a homeschool with the North Carolina Department of Public Instruction. [REDACTED] testified that she provided educational instruction to [REDACTED] while residing in Onslow County from October 15, 2015 until February 9, 2015. Finding of Fact 46, Rule 41(b) Order.

#### ***December 18, 2015 Eligibility Meeting***

59. Petitioners attended a referral meeting on December 18, 2015. The IEP team decided to conduct formal testing to determine if [REDACTED] was a student with a disability under the classifications of Developmental Delay, Autism, or Other Health Impaired. Stip. 63, Stip. Ex. 51.

60. At the December 18, 2015 IEP meeting, the team determined that the following information was needed to determine if [REDACTED] was or was not eligible for special education services: "vision and hearing screenings, conferences or contacts with parents, educational and psychological evaluations to include IQ testing, adaptive testing, a speech/language evaluation including pragmatics and semantics, a behavioral and emotional evaluation to include characteristics of

autism, a social developmental history, observation across settings, a health screening required for DD, a motor screening, and two researched based interventions.” Stip. 64, Stip. Ex. 50, p. 218.

61. Testing started the same day as the referral meeting and continued through January 25, 2016. Stips. 65-68. Testing included a speech language evaluation, a psycho-educational evaluation, and an occupational therapy evaluation. Stip. Exs. 58, 61 & 62.

62. On February 5, 2016, through their attorney, [REDACTED], Petitioners requested that “neither Ms. [REDACTED] nor Ms. [REDACTED] have any contact with their child.” Stip. Ex. 169, p. 1668. OCS complied with this request and ultimately Ms. [REDACTED] was assigned [REDACTED]’s EC teacher. *Id.* [REDACTED] had not subsequently requested a FBA on behalf of Petitioner, nor did the team agree to conduct a FBA at the December 18, 2015 or February 2, 2016 IEP meeting. Stip. Ex. 50, p. 218.

63. A psycho-educational evaluation was conducted on January 4, 2016, which reported [REDACTED] had an average IQ (96 Standard Score “SS”), average school readiness composite (89 SS), average academic application (97 SS), and well above average general developmental profile. Stip. Ex. 61.

64. A speech/language evaluation was conducted on January 14, 2016, and he scored in the average range. Stip. Ex. 61.

65. On February 2, 2016 the IEP team developed an Initial IEP and Behavior Support Plan (the “February 2 IEP”). Stip. Exs. 81 & 65.

66. A subsequent IEP meeting was held on February 24, 2016 (the “February 25 IEP”), OSC convened an IEP meeting at the request of Petitioners [REDACTED] and [REDACTED] through their attorney, to re-address transportation<sup>5</sup> and get started on an FBA. Stip. 77; Stip. Ex. 167, p. 878.

67. Both the February 2, 2016 IEP and February 25, 2016 IEPs had the same goal, however, the parents’ concerns at the February 24, 2016 IEP meeting were as follows:

The parents are concerned with the level and escalation of behaviors they haven’t seen in other environments. Additionally, parents are concerned that [REDACTED] has an intensive support person who is qualified to address [REDACTED]’s needs without the end result being physical restraint. Stip. Ex. 96, p. 451.

68. The parent’s vision on the February 25 IEP was “[REDACTED] parents want [REDACTED] to be ‘monitored’ and in general education but realize that it may take some time to do.” Stip. Ex. 96, p. 451.

69. Although Petitioner’s private BCBA therapist had developed an ABA therapy plan with behavior and communication goals on January 28, 2016 and [REDACTED] had received some ABA therapy, Petitioner did not share this plan with the IEP team on February 24, 2016, nor did they allow the ABA therapist to discuss the ABA home program. Stip. Ex. 96, p. 451.

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<sup>5</sup> Due to [REDACTED]’s behavior, he was not permitted to ride the regular school bus. Tr.Vol. 6, p. 168:10-17; Stip. Ex. 81, p. 408. Transportation was not an issue at the hearing.

70. During the Spring semester of the 2015/2016 school year, from February 9 to February 24, 2016 [REDACTED] attended school two (2) full days and eight (8) partial days. From February 25 to March 24, 2016, [REDACTED] attended school eleven (11) full days and three (3) partial days.

71. Prior to removing [REDACTED] [REDACTED] admitted that “[s]ince [REDACTED] aide Ms [REDACTED] arrived two weeks ago there has been a drastic change in his behavior (for the better), I have been told he has not hit, kicked or eloped in two weeks.” Stip. Ex. 117, p. 500.

72. However, in the same email, dated March 22, 2016 Petitioner [REDACTED] requested that Principal [REDACTED] “[r]emove [REDACTED] from [REDACTED] caseload... he’s afraid of her.” Stip. Ex. 117, p. 500.

73. [REDACTED]’s rationale was “[b]ecause [REDACTED] has expressed a great deal of pain and has shown physical and verbal proof, I am again requesting [REDACTED] leave him alone and REMOVE HIM FROM MS [REDACTED] [REDACTED] relocating him with Ms. [REDACTED] Stip. Ex. 117, p. 500 (emphasis in original).

74. According to [REDACTED] “It is clear that Ms. [REDACTED] is becoming not only a disruption to [REDACTED] but is causing a great deal of pain and anguish both physically and mentally.” Stip. Ex. 117, p. 500. “[REDACTED] has told me [REDACTED] on numerous occasions [REDACTED] is AFRAID of Ms. [REDACTED] afraid she’s going to cause [REDACTED] bodily harm. [REDACTED] says her CPI holds hurt so bad [REDACTED] feels like [REDACTED] is ‘going to die’ when she she [sic] restrained him. [REDACTED] states [REDACTED] shoulders are still very sore from the CPI holds she has placed [REDACTED] in.” *Id.* (emphasis in original). “[REDACTED] states Ms. [REDACTED] is being a BULLY toward [REDACTED] and I believe [REDACTED].” *Id.* (emphasis in original).

75. After a meeting with school administration at the central office on March 18, 2016, [REDACTED] accused the EC Director [REDACTED] of assaulting her in the school office. Resp. Exs. 3, 4 & 5.

76. [REDACTED] falsely reported to Ms. [REDACTED] on March 27, 2016 that the “sheriff’s office assigned an investigator to investigate what’s been going on with [REDACTED] and his excessive restraints over the past month or so. It’s in the DAs hands now.” Resp. Ex. 1, p. 81.

77. Because of [REDACTED]’s “aggressive and threatening behavior toward school staff and [REDACTED] and her “failure to comply with school officials’ instructions,” on March 23, 2016 Petitioner [REDACTED] was presented with a letter from OCS board attorney prohibiting her from being on campus. Stip. Ex. 118.

78. [REDACTED]’s last day of school at [REDACTED] was March 24, 2016. Stip. 85.

79. Petitioners [REDACTED] and [REDACTED] enrolled [REDACTED] at [REDACTED] on April 11, 2016, and [REDACTED] has attended [REDACTED] since that time. Stip. 89.

80. [REDACTED]’s tenure at [REDACTED] has followed a similar pattern.

81. By February 14, 2017, Petitioners' relationship with [REDACTED] deteriorated to the point school administrative reported that [REDACTED] "rant[ed] about unacceptable aspects of staff's behavior", "upset, lack of good faith between administration and parents....not able to ensure [REDACTED]'s success." Resp. Ex. 8, p. 463.

82. On April 3, 2016, [REDACTED] accused a [REDACTED] teacher of provoking and belittling [REDACTED] Resp. Ex. 1, p. 76. Ms. [REDACTED] clarified that the "teacher did not point [REDACTED] out." Resp. Ex. 1, p. 76.

83. According to Ms. [REDACTED] teacher at [REDACTED] behavior had not improved. "On a good day, we don't know how his behavior will be. Some days are better than others. Some days, they're awful and some days they're fine. But it's a constant adjustment." Tr. Vol. 5, p. 97:18-23; *see also*, Resp. Ex. 78, pp. 205 & 402.

84. [REDACTED]'s aggressive behaviors have been persistent since his enrollment. Tr. Vol. 5, p. 97:25-98:3 (testimony of [REDACTED])

85. And, [REDACTED] aggressive behaviors towards staff have been persistent since his enrollment. Tr. Vol. 5, 98:4-5 (testimony of [REDACTED])

86. Even if OCS denied [REDACTED] a FAPE, the private school placement was inappropriate. Being a "safe place to land" as described by Ms. [REDACTED] did not make the private school appropriate since [REDACTED] had no academic challenges and [REDACTED] behavioral issues persisted.

### **Failure To Appropriately Evaluate**

87. Petitioners argue that "[b]ecause of OCS's failures [to evaluate [REDACTED]'s pragmatic language needs and request a FBA on 12/18/15] OCS could not and did not develop an IEP for [REDACTED]'s individual needs, the IEPs and Behavior Support Plans were inappropriate for [REDACTED], significant portions were either not implemented or were inappropriately implemented, and [REDACTED] failed to make meaningful progress." Pet. Pro. Dec. FoF ¶3, p. 6 (emphasis in original).

88. Petitioners' case and their expert's opinion rest primarily on those two pivotal arguments for proving the inappropriateness of [REDACTED]'s IEPs and Behavior Support Plans.

89. As discussed *infra*, the Undersigned finds that OCS did conduct a pragmatic language measure and was not legally required to conduct a FBA.

### **Petitioners' Expert Ms. [REDACTED] Overall Impressions/Assumptions**

90. Petitioner's expert Ms. [REDACTED] made assumptions in her report which was Pet. Ex. 74. In her review and testimony, Petitioners' expert was either given misinformation or made several assumptions. Ms. [REDACTED] misimpressions were:



- a) [REDACTED] started school with a history of infrequent maladaptive behaviors secondary to [REDACTED] diagnose of Autism and ADHD. Pet. Ex. 74, p. 790.
- b) At the time of [REDACTED] entry to school, [REDACTED] had been receiving home-based ABA services. Pet. Ex. 74, p. 790-791.
- c) Although the school had information about [REDACTED] diagnosis and therapeutic history, the school neglected to contact the BCBA heading [REDACTED]s home program so that information and strategies could have been shared. Given her specialty and expertise, the BCBA could have assisted in making a smooth transition for [REDACTED] as well as supported the implementation of a consistent behavior plan.” Pet. Ex. 74, p. 791.
- d) The OCS’ failure to completed a behavior plan until 5 months (February 2016) after the September 15 need for restraint “demonstrate[d] negligence in addressing the problem and resulted in maladaptive behaviors increasing in both frequency and severity as the year progressed. Pet. Ex. 74, p. 791.

91. Contrary to Ms. [REDACTED] overall assumptions, the evidence showed that none of her impressions were correct.

92. To the extent that Petitioners’ expert opinion about the appropriateness of the IEPs and BSPs relied on Petitioners’ arguments that a pragmatic language measure was not conducted and a FBA was legally required, it carried little weight with the Undersigned.

#### ***Functional Behavior Assessment***

93. Petitioners contend that OCS should have “requested” a Functional Behavior Assessment (“FBA”) at the December 18, 2015 IEP meeting.

94. [REDACTED] provided inconsistent testimony throughout this hearing regarding when, if ever, she requested an FBA prior to the February 24 meeting. She initially testified that Ms. [REDACTED] said during their phone call on November 15, 2015 that she would conduct an FBA for [REDACTED] but she subsequently testified that she was not familiar with the term “FBA” at that time and that Ms. [REDACTED] had only mentioned an “observation,” not an FBA. Tr. Vol. 8, pp. 11-12.

95. Ms. [REDACTED] did not recall Petitioners mentioning an FBA at either the December 18, 2015 referral meeting or the February 2, 2016 IEP meeting. Tr. Vol. 13, p. 38.

96. In an email exchange dated between Ms. [REDACTED] and [REDACTED], Petitioners’ attorney during that time frame, Ms. [REDACTED] specifically stated that a BSP was being developed and that the team would request an FBA once he was enrolled in school, which happened after the February 2, 2016 IEP meeting. Stip. Ex. 169, p. 1587.

97. Petitioners did not present any credible evidence indicating that they requested an FBA prior to the February 24, 2016 IEP meeting.

98. Petitioners' expert [REDACTED] was highly critical of OCS for failure to conduct a FBA before developing the IEP goal and Behavior Support Plans/Behavior Intervention Plan.

99. However, OCS was not legally required under IDEA or State law to conduct a FBA at this stage.

100. Ms. [REDACTED] acknowledged that although a FBA was not a legal requirement it would have been "best practice" for OCS to have agreed to conduct a FBA at the December 18, 2015 and February 2, 2016 IEP meetings.

101. The Undersigned finds that, although it may not have been "best practice", that OCS did not deny [REDACTED] a free and appropriate public education and was not legally obligated to conduct a FBA prior the development of the IEP behavioral goal, Behavior Support Plans, and/or Behavior Intervention Plan at the December 18, 2015 Eligibility meeting, the February 2, 2016 IEP meeting, and the February 24, 2016 IEP meeting.

### ***Speech Language Evaluation***

102. Of the evaluations conducted, Petitioners contend that they have contested only the speech language evaluation.

103. However, when asked at the hearing by the Undersigned: "Is there an allegation in the petition, Ms. [REDACTED], of certain evaluations that were not conducted." Tr. Vol. 2, p 168:6-8. Petitioners' counsel conceded that the FBA was the only evaluation Petitioners alleged should have been conducted. Tr. Vol. 2, p. 168: 9-15.

104. The *Pro Se* Amended Petition dated July 15, 2016 in the Claim for Relief states: "4. The Onslow County School System failed to fully and appropriately evaluate [REDACTED] as they never conducted an OT evaluation, physical therapy evaluation, or a Functional Behavior Assessment." *Pro Se* Amended Petition OAH case file no. 16 EDC 4738, ¶4.

105. In the Petition, case file no. 17 EDC 0447, Petitioners complained that "The PLS-5 does not have a pragmatic measure, and the speech/language evaluation did not utilize and other pragmatic assessments." Petition dated January 23, 2017, ¶14. Petitioners concluded that OCS "failed to conduct a pragmatic language assessment that they agreed on December 18, 2015 to conduct." Third Petition ¶ 14.

### ***Pragmatic Language Assessment***

106. In sum, Petitioners alleged that the speech language evaluation was flawed in three ways: (1) the evaluation did not include a pragmatic language assessment; (2) the conclusion that [REDACTED]'s pragmatic language skills were within functional limits for his age lacked support; and (3) certain

information provided by Petitioner [REDACTED] ( [REDACTED]'s teacher) and considered in the evaluation was inconsistent with the speech pathologist's conclusion that [REDACTED] did not have a pragmatic language deficit. Third Petition, ¶¶ 14-17.

107. Pragmatic language skills include the communication functions of "learning to understand and interpret emotion, recognizing social cues, learning how to resolve conflict and understanding nonverbal communication." Pet. Ex. 93, p. 1063.

108. The North Carolina Department of Public Instruction established the specific assessments and screenings that are required by school districts to determine a student's eligibility for each of the 14 areas of eligibility recognized in the State of North Carolina. *See* NC 1503-2.5(d). For a student to qualify as eligible in the area of Autism, the School District must conduct ten different screenings and evaluations, including a psychological evaluation and a "speech language evaluation which includes, but is not limited to, measures of language semantics and pragmatics." NC Policy 1503-2.5(d)(1)(i)(H)-(I).

109. For eligibility purposes, a Speech Language Evaluation was conducted by OCS on January 14, 2016 by Speech Pathologist [REDACTED] which included a measure of pragmatic language. Stip. Ex. 58.

110. In addition to the Preschool Language Scales, Fifth Edition ("PLS-5") which assessed [REDACTED]'s auditory comprehension (113 SS), expressive communication (110 SS), and total language (112 SS), both Speech Pathologist [REDACTED] and [REDACTED] completed checklists regarding [REDACTED]'s understanding and use of pragmatic language. Stip. Ex. 58.

111. Speech Pathologist [REDACTED] noted that [REDACTED] reported that [REDACTED] "has significant difficulty understanding and using body language, understanding and using physical space boundaries, and interrupting appropriately." Stip. Ex. 58, pp. 252-253.

112. The IEP team documented [REDACTED]'s reports about his pragmatic skills deficits in the Summary of Evaluation/Eligibility Worksheet-Autism Spectrum Disorder ("AU Worksheet"). Stip. Ex. 67, p. 318.

113. [REDACTED] also "reported mild difficulty maintaining a topic and providing sufficient information for listener comprehension." Stip. Ex. 58, p. 253.

114. Based on the pragmatic assessment, Speech Pathologist [REDACTED] concluded that [REDACTED] used "pragmatic language expected for a kindergarten student within a structured, small group setting." Stip. Ex. 58, p. 253.

115. [REDACTED] was five (5) years old when [REDACTED] was evaluated in 2016.

116. [REDACTED] a private speech pathologist was the only witness to provide testimony in support of Petitioners' position. Ms. [REDACTED] based her testimony upon her review of the speech-language evaluation conducted by OCS (and the documents referenced therein) and on her own

speech-language evaluation of [REDACTED] which she conducted more than a year after OCS' evaluation was conducted. Pet. Ex. 93.

117. Ms. [REDACTED] evaluation included two assessments. The first assessment she used was the Social Language Development Test – Elementary. Pet. Ex. 93.

118. The Social Language Development Test can only be used to evaluate children age 6 and above. *See* Tr. Vol. 3, p. 79. Ms. [REDACTED] admitted that this test would not have been [REDACTED] for [REDACTED] at the time of his evaluation at Onslow County Schools, because at that time, [REDACTED] was age 5. Because this test was not appropriate for evaluating a 5 year old, it had little probative value to the Undersigned.

119. Ms. [REDACTED] testified that she used the 2008 version of Social Language Development Test, and that she was not aware that a re-normed version had been published in 2017. Tr. Vol. 3, p. 79.

120. As part of her evaluation, Ms. [REDACTED] asked that [REDACTED] complete the Children's Communication Checklist-2 (CCC-2) (not admitted). Tr. Vol. 4, p. 37.

121. Ms. [REDACTED] reported that the CCC-2 showed that [REDACTED] scored average for speech, syntax, coherence and below average in semantics, initiation, scripted language, context, nonverbal communication, social relations, and interests. Pet. Ex. 93, pp. 1061-1062. Ms. [REDACTED] concluded that [REDACTED] had severe deficits in the areas of scripted language, understanding context, and limited interests. Pet. Ex. 93, p. 1062.

122. On this basis, Ms. [REDACTED] opined that [REDACTED] must have had a pragmatic language deficit in January 2016. Tr. Vol. 2, p. 191.

123. Even one year later when Ms. [REDACTED] conducted her pragmatic language evaluation of [REDACTED] on March 2, 2017, many of [REDACTED]'s deficits in "making inferences", "interpersonal negotiation", "supporting peers" were skills that Ms. [REDACTED] opined were "just emerging in typically developing children [REDACTED] age (then six years old)." Pet. Ex. 93, pp. 1059-1061.

124. Petitioners' expert, like Ms. [REDACTED] concluded that [REDACTED] pragmatic language skill deficits were "skills which typically developing children are just beginning to learn according." Pet. Ex. 93, p. 1063.

125. OCS' expert, [REDACTED] provided extensive testimony regarding the appropriateness of the speech language evaluation. Tr. Vol. 12, p. 77-103.

126. OCS' evaluation was conducted for the purpose of determining whether [REDACTED] had speech-language deficits that would impact his experience in the educational setting. *See* Tr. Vol. 12, pp. 131-133 (testimony of [REDACTED]). Ms. [REDACTED] explained that the speech pathologist must first determine whether the student has weaknesses; then, the IEP team determines whether a weakness identified would impact the student's experience in the classroom to the extent it should be targeted by an IEP goal. *Id.* at 133 (testimony of [REDACTED]).

127. Ms. [REDACTED] acknowledged that the purpose of her assessment in March 2017 was not consistent with the purpose of the evaluation conducted by OCS in January 2016. Tr. Vol. 4, p. 26. She testified that her goal was not to assess [REDACTED]'s pragmatic skills with regard to his performance in the school setting. *Id.*

128. [REDACTED]'s speech-language evaluation was conducted by OCS Speech-Language Pathologist [REDACTED] Stip. Ex. 58. The speech-language evaluation included four assessments: (1) a Pragmatic Language Observation Checklist, completed by Ms. [REDACTED] (2) a Pragmatic Language Teacher Rating Scale, completed by [REDACTED] (3) a Teacher Input Functional Communication form, completed by A.H.; and (4) the Preschool Language Scales, 5<sup>th</sup> Edition ("PLS-5"), administered by Ms. [REDACTED] See Stip. Exs. 58, 59, 60, and 171.

129. The two other assessments completed as part of the pragmatics language component of the SLP evaluation were the Pragmatic Language Teacher Rating Scale and Teacher Input Functional Communication Form. Stip. Exs. 59-60. These pragmatic language assessments were appropriately used to provide information regarding skills that the evaluator did not personally observe during the evaluation. Tr. Vol. 12, p. 126-129 (testimony of [REDACTED])

130. On the Pragmatic Language Teacher Rating Scale, [REDACTED] rated [REDACTED] as above average - the highest rating possible - in 11 of 19 categories listed, and as average in three categories. *Id.* [REDACTED] rated [REDACTED] as having a mild difficulty in two areas, and significant difficulty in three areas. See Stip. Ex. 59.

131. Each of the areas in which [REDACTED] reported mild or significant difficulty for [REDACTED] was an emerging skill for kindergarteners. Tr. Vol. 12, pp. 116-119 (testimony of [REDACTED])

132. [REDACTED] also completed the Teacher Input-Functional Communication checklist, which asks about six skills. [REDACTED] indicated that she had observed [REDACTED] demonstrate five of the six skills listed. See Stip. Ex. 60. Significantly, [REDACTED] admitted that the totality of information provided by [REDACTED] in the assessment was very favorable for an educational setting. Tr. Vol. 12, pp. 119-120.

133. The one skill listed on the Teacher Input-Functional Communication checklist that [REDACTED] did not indicate she had observed, "demonstrating knowledge of what was conveyed through action or speech," was a higher level skill that would be more appropriately expected of an older student, and was something a five-year-old student is still learning how to do. Tr. Vol. 12, p. 121 (testimony of [REDACTED])

134. Asked to provide other observations related to [REDACTED]'s communication skills, [REDACTED] added the following comment to the Teacher Input-Functional Communication checklist: "using 'words' to avoid angry outbursts, to communicate feelings [and] doesn't always understand normal social cues. Has a hard time finding the 'right' words to express things." Stip. Ex. 60.

135. When asked about the impact this comment had on her impression of this assessment, Ms. [REDACTED] testified that a child's ability to express [REDACTED] feelings is a complex, abstract concept

children age five are still being taught. Tr. Vol. 12, p. 123. She also stated that the absence of one skill on Teacher Input-Functional Communication form would not outweigh the other five skills [REDACTED] had observed, and that she interpreted the form as providing a favorable assessment of [REDACTED]'s pragmatic skills. Tr. Vol. 12, p. 120.

136. The areas of weaknesses noted in the Pragmatic Language Teacher Rating Scale and Functional Communication form would not prompt Ms. [REDACTED] to conduct a more comprehensive standardized assessment of pragmatics, because the vast majority of information provided on the forms was favorable and because a standardized assessment may not accurately gauge a student's understanding of a given social scene. See Tr. Vol. 12, p. 145 (testimony of [REDACTED]).

137. Petitioners presented no testimony to support their assertion that the speech-language evaluation completed by OCS did not include a pragmatic language assessment or that the IEP team did not consider [REDACTED]'s pragmatic language issues as it related to his Autism during the Eligibility or subsequent IEP meetings.

138. On cross examination, Ms. [REDACTED] admitted that neither the North Carolina Department of Instruction ("NCDPI") nor the American Speech-Language Hearing Association ("ASHA") mandate use of a criterion reference tool to measure pragmatics when determining eligibility in the area of autism. Tr. Vol. 4, pp. 10-11.

139. The Undersigned finds that although Ms. [REDACTED] may prefer that speech pathologists use standardized measures when assessing an autistic students' pragmatic skills, there is no requirement that an SLP use a standardized pragmatics assessment when testing a student for the purpose of determining eligibility for services in the suspected category of Autism.

140. The Undersigned finds that OCS did conduct a pragmatic language measure appropriate in light of [REDACTED]'s developmental age and, at that time, [REDACTED]'s pragmatic skills were still developing.

#### *Pragmatic Language Deficit and Autism Eligibility*

141. Ms. [REDACTED] noted that the difference for people with Autism and [REDACTED] is that they are often "confused about the social world around them," "don't know how to apply these [social] rules," and "don't often understand how their own behavior is likely to impact other people... how others might react or feel about them." Pet. Ex. 93, p. 1063.

142. Ms. [REDACTED] testified that some information obtained through the Pragmatics Assessments indicated the presence or absence of behaviors that are "hallmarks" of children with autism. Tr. Vol. 2, p. 181.

143. Petitioners complained that OCS failed to identify [REDACTED]'s pragmatic language skills, however, [REDACTED]'s social skills deficits, including pragmatic language deficits, were discussed by the IEP team at the Eligibility IEP Meeting.

144. The IEP Team agreed with Ms. [REDACTED] that [REDACTED]'s pragmatic language deficits were one factor in determining him eligible under the category of Autism.

145. Ms. [REDACTED] diagnostic impression was considered by the IEP eligibility team with respect to [REDACTED]'s pragmatic skills deficits. The Eligibility AU Worksheet documented all Ms. [REDACTED] impressions along with [REDACTED]'s reports, autism rating scales documented and teacher reports about [REDACTED]'s social skills deficits. See Stip. Ex. 67. The IEP noted that [REDACTED] "required classroom accommodations and specialized instruction to address his social skills deficits..." Stip. Ex. 81, p. 402.

146. The AU Worksheet documented that the "[t]eacher and parent on the ABAS-II and GRS-3 rating scales indicted that [REDACTED] has difficulty reading social cues, predicting consequences of social events and responding to others feelings appropriately." Stip. Ex. 67, p. 321.

147. According to the ABAS-II rating scales "social interaction skills [were] a weakness within the school setting." *Id.* The GARS-3 ratings determined that "[REDACTED] has difficulty with the following special skills across settings: has difficulty when someone is teasing and has difficulty understanding what causes people to dislike him." Stip. Ex. 67, p. 321.

148. On the social domain of the Adaptive Behavior Assessment, [REDACTED]'s teacher rated [REDACTED] in the extremely low scale (standard score 64). Stip. Ex. 67, p. 326.

#### *Social Skills Instruction*

149. OCS provided social skills instruction consistent with Ms. [REDACTED] and Ms. [REDACTED] recommendations.

150. In her evaluation, Ms. [REDACTED] recommended the provision of "secondary reinforcement for 'pro-social' behaviors" paired with "explanations about how [REDACTED] behavior is likely to make others think or feel about what [REDACTED] is doing and as a result, what they may think, feel or do." Pet. Ex. 93, p. 1063.

151. Ms. [REDACTED] suggested "teaching strategies" using video models or special social stories; reinforcement of target behavior in context, coaching conflict resolution; targeting specific behavior in the environment; pairing new activities with reinforcement; use of high interest items in teaching; set up scenarios and prompt him to ask for help. Pet. Ex. 93, pp. 1064-1065.

152. According to Ms. [REDACTED] these replacement skills could "replace some of the maladaptive behaviors [REDACTED] accidentally learned to use to avoid or escape from demands." Pet. Ex. 93, p. 1065.

153. [REDACTED] Petitioners' private BCBA therapist also recommended teaching functional communication skills. Tr. vol.4, p. 162:11-27.

154. Prior to either speech language evaluation, [REDACTED]'s social skills deficits were noted by OCS at [REDACTED]. On October 8, 2015, [REDACTED] was invited to participate in a social skills group beginning October 14, 2015 which "include[d] activities and hands on interactions" with the topics of "respect, feelings, per interaction and courtesy." Stip. Ex. 35.

155. The social skills class was consistent with Ms. [REDACTED] recommendation, however, Petitioners withdrew [REDACTED] before the social skills class started.

156. After the February 2 IEP was developed, [REDACTED] was provided social skills instruction five days a week when he returned to [REDACTED] Stip. Ex. 81, p. 409. This was also consistent with Ms. [REDACTED] recommendation. However, because of ABA therapy, doctor's appointments, and other reasons, [REDACTED] only attended two full days at [REDACTED] and was [REDACTED] for most social skills instruction.

157. The Undersigned finds Petitioners failed to demonstrate that the pragmatics measures used by OCS in its speech language evaluation did not meet state requirements or were inadequate.

158. Ms. [REDACTED] evaluation of [REDACTED] was based on an assessment [REDACTED] at the time of the Board's evaluation, and conducted not for the purpose of determining whether [REDACTED] had pragmatic language deficits that are likely to impact him in the educational environment.

159. The Undersigned finds that Ms. [REDACTED] findings, even if accurate, cannot be used to indicate the presence of alleged deficits in pragmatic language as of Respondent's evaluation in January 2016 when [REDACTED] was only five years old.

160. In her evaluation, Ms. [REDACTED] did not recommend speech/language therapy. Pet. Ex. 93.

161. However, at the hearing Ms. [REDACTED] recommended compensatory pragmatic language therapy twice a week in social environment such as the playground and cafeteria. Tr. vol. 3, p. 63:2-7. Respondent's offered social skills training for five times a week.

162. Accordingly, the Undersigned finds that the weight of the evidence supports Respondent's position that the speech-language evaluation it conducted was appropriate and compensatory pragmatic language therapy is not warranted as a remedy.

### **Appropriateness of February 2 and February 25 IEP's**

#### ***February 2 IEP Meeting***

163. The IEP team reconvened on February 2, 2016 to develop an initial IEP and Behavior Support Plan for [REDACTED] with duration dates of February 8, 2016 to February 1, 2017. Stips. 68 & 70; Stip. Ex. 81.

164. [REDACTED] and [REDACTED] attended the February 2 IEP meeting along with their attorney, Vicki O'Brien, and their private BCBA [REDACTED] Stip. 69; Tr. Vol. 13, p. 39.



165. [REDACTED]'s IEP team included several OCS employees based at [REDACTED] including [REDACTED] and [REDACTED] both of whom participated.

166. In addition to serving as a member of [REDACTED]'s IEP team, Ms. [REDACTED] provided direct instruction to [REDACTED] on a near-daily basis when [REDACTED] attended school.

167. Ms. [REDACTED] served as [REDACTED]'s classroom teacher during his brief initial period of enrollment, at the start of the 2015-2016 school year, and during [REDACTED] enrollment in February and March of 2016. *See* Tr. Vol. 14, pp. 23, 25.

168. Although Ms. [REDACTED] was Petitioners' private BCBA therapist, neither party asked Ms. [REDACTED] about her opinions about the appropriateness of the IEP or BSPs. However, with respect to the FBA, Ms. [REDACTED] testified prior to February 24, 2016 that it "wasn't surprising that a behavior assessment had not been done yet." Tr. Vol. 4, p. 143:15-18.

169. [REDACTED]'s present level of performance, as documented in the IEP, captured his functional behavioral issues during [REDACTED] short period of attendance during the fall. Tr. Vol. 13, pp. 33-34 (testimony of [REDACTED]). The present levels reflected the team's review of teacher observations, behavior restraints forms, and input from observations. Tr. Vol. 13, p. 34 (testimony of [REDACTED]).

170. At the February 2, 2016 IEP meeting, the team ultimately developed the following behavioral goal for [REDACTED]

When [REDACTED] becomes upset, frustrated, or angry, [REDACTED] will use self-regulation/coping strategies (movement breaks, deep breathing, quiet space, deep pressure/heavy work activity, etc.) to avoid engaging in an aggressive or non-compliant behavior, with two or fewer verbal or visual reminders, on 4 out of 5 opportunities. Stip. 71; Stip. Ex. 81, p. 402.

171. The February 25, 2016 IEP had the same goal. Stip. Ex. 96, p. 454.

172. The IEP team chose the specific coping strategies included in the goal (within parentheses, above) based on what they knew about [REDACTED] what they had observed of [REDACTED] thus far, and their collective experience as educators. Tr. Vol. 13, pp. 37-38 (testimony of [REDACTED]).

173. Ms. [REDACTED] personally reviewed teacher documentation notes, anecdotal notes, and other notes describing behavioral incidents from [REDACTED]'s prior enrollment at both [REDACTED] and [REDACTED]. Tr. Vol. 13, pp. 135-136. These documents informed Ms. [REDACTED]'s sense of how to collaborate with her colleagues in the IEP meeting. *See id.*

174. The IEP team determined that [REDACTED]'s progress on his goal would be measured through frequency/anecdotal notes. *Id.*

175. The IEP behavior goal is essentially a combination of the [REDACTED]'s Behavior Priorities in his Behavior Support Plan. Stip. Ex. 8.

176. Behavior Priority #1 in the BSP stated "[REDACTED] will comply with adult instruction with 2 or fewer redirections 80% of the time." Stip. Ex. 88, p. 426.

177. Behavior Priority #2 in the BSP stated: "[REDACTED] will use self-regulation/coping strategies to calm [REDACTED] and avoid escalation with the aid of verbal and visual prompts in 4 out of 5 opportunities." Stip. Ex. 88, p. 426.

178. According to the IEP, [REDACTED]'s "Behaviors will be addressed in a behavior goal as well as with a behavior support plan." Stip. Ex. 81, p. 401.

179. Both the February 2 and February 25 Behavior Support Plans were referenced and attached to [REDACTED]'s IEPs as well as signed by the IEP team members.

180. The Behavior Support Plan was a supplemental aid/support in all of [REDACTED]'s general education academic classes and nonacademic services and activities. Stip. Ex. 81, pp. 404-406.

181. The BSP were similar to the "Adaptive Behavior and Social Domain" goals in [REDACTED]'s ABA Treatment Plan. *See* Stip. 81 *and* Pet. Ex. 4.

182. The IEP team agreed that [REDACTED] would need daily sessions of instruction in the EC classroom on social/emotional skills to develop the skills necessary to accomplish his behavioral goal. Stip. 73; Tr. Vol. 13, pp. 38-39. Daily social skills instruction addressed similar concerns targeted by the communications goal in the ABA Plan. *Compare* Stip. Ex. 81 and Pet. Ex. 4.

183. Because of [REDACTED]'s sensory needs, the IEP Team also agreed upon seven sessions per reporting period of occupational therapy, to be provided in the total school environment. Stip. 73.

184. The IEP included several accommodations and modifications to support [REDACTED] including preferential seating, visual schedule, warnings before transitions, and use of a cool-down area. Stip. Ex. 81, pp. 404-406; Tr. Vol. 13, pp. 40-42.

185. Petitioners contend, in part, that the February 2 and 24 IEPs were inappropriate because the IEP behavior goal lacked a baseline to measure the use of the self-regulation/coping strategies articulated in the goal and did not include goals for replacement behaviors. Third Petition, ¶¶ 21-25. Of note, the ABA Treatment Plan also did not contain special quantitative baseline data. *See* Pet. Ex. 4.

### ***IEP Goal***

186. During her testimony, Ms. [REDACTED] critiqued the IEP goal, the service delivery, and the supplemental services/accommodations.

187. Ms. [REDACTED] opined that the IEP goal was inappropriate primarily because the IEP team had not yet determined the function of [REDACTED]'s behavior by conducting a FBA. Tr. Vol. 2, p. 208.

188. The IEP team does not need to determine the function of the behavior prior to developing an IEP goal. Tr. Vol. 11, p. 50: 2-12 (testimony of [REDACTED]). Ms. [REDACTED] testified that it would be "unethical" for the team to delay in developing an IEP goal simply because it had not yet determined the function of the behavior. *Id.* at p. 50.

189. Both Ms. [REDACTED] and Ms. [REDACTED] agreed that there was no requirement under the IDEA or state law that educators conduct a Functional Behavioral Assessment ("FBA") before developing a behavior goal in an IEP. *See* Tr. Vol. 3, pp. 104-105. (testimony of [REDACTED] Vol. 11, p. 60 (testimony of [REDACTED])).

190. Even if Respondent had agreed to conduct a FBA on December 18, 2015, [REDACTED] did not return to an educational setting until February 9, 2016.

191. Ms. [REDACTED] also criticized OCS for not conducting a FBA while [REDACTED] was being homeschooled. The Undersigned finds that although [REDACTED] testified that she taught [REDACTED] some instructional material, it is highly unlikely that the home setting presented with the same instructional and/or sensory environment as a regular kindergarten school class with all the peer interactions and academic demands.

192. When [REDACTED] did return to the educational setting, during the interim period between the first IEP (February 2) and second IEP (February 25), [REDACTED] had only attended 2 full days.

193. Whether Ms. [REDACTED] was aware of [REDACTED]'s sporadic attendance was unclear.

194. Ms. [REDACTED] criticized the data OCS used from the behavior reports as unreliable and not sufficiently frequent for developing the BSPs.

195. The Undersigned agrees with Ms. [REDACTED] opinion, 2 days of data would not be sufficient for a reliable FBA.

196. [REDACTED]'s attendance, or lack thereof, significantly impacted OCS' ability to collect reliable and frequent behavioral data.

197. After the IEP Team agreed to conduct a FBA on February 24, 2016, the FBA was completed on March 31, 2016.

198. After February 24, 2016, [REDACTED]'s attendance improved but he still only attended 11 full days.

199. Once again, the IEP Team's efforts to prepare the FBA were thwarted by the Petitioners when [REDACTED] only attended 11 full days of school and Petitioners cancelled the IEP meeting scheduled to review the FBA on April 6, 2016.

200. The Undersigned finds that the absence of a Functional Behavior Assessment does not render an IEP behavior goal inappropriate and that the Respondent provided a cogent and responsive explanations of their decisions in light of the difficulties faced in developing the IEP.

***Goal Was Developmentally Appropriate and Measurable***

201. Ms. [REDACTED] testified that the goal was “developmentally inappropriate,” on the basis that it is “a lifelong learning skill to be able to recognize our own arousal state, to identify that, and then to be able to choose an appropriate response, no matter how we’re feeling.” Tr. Vol. 2, pp. 208-209.

202. Ms. [REDACTED] testified that she “didn’t see any evidence as to why [the goal] wouldn’t be appropriate for [REDACTED] at his developmental age.” Tr. Vol. 11, p. 59.

203. Petitioners did not present any evidence to support Ms. [REDACTED] premise that an IEP goal is inappropriate for a particular student simply because it targets a skill that children and adults of different ages may work to acquire.

204. Ms. [REDACTED] concluded that the goal was designed to meet [REDACTED]’s unique needs, and that it “absolutely” provided him with an opportunity for a free, appropriate, public education. Tr. Vol. 11, p. 57.

205. The goal was appropriate, noting that it properly targeted the problem behaviors to be replaced with positive, functional behaviors. Tr. Vol. 13, pp. 35-36 (testimony of [REDACTED]).

206. The Undersigned notes that several of the antecedent strategies Ms. [REDACTED] testified she offered at this initial IEP meeting – “requesting a break” and “expressing what’s going on with [REDACTED] so that [REDACTED] doesn’t have to get to the point where [REDACTED] runs out of the classroom or throws materials on the ground” – mirror the self-regulation coping strategies included on [REDACTED]’s IEP goal. Tr. Vol. 4, pp. 9-16.

207. Ms. [REDACTED] opined that the behavior goal was also not measurable. Tr. Vol. 2, pp. 209-210.

208. The behavior goal was indeed measurable, noting that it included a specific number of prompts to be provided to [REDACTED] Tr. Vol. 11, pp. 57-58 (testimony of [REDACTED] Ms. [REDACTED] acknowledged that she would have tweaked the goal by adding a time component, so that it aimed for use of the skills noted in four out of five opportunities over the course of a specific number of weeks or trials. *Id.* at 58. But even without this added element, the goal was measurable as written. *Id.* at 57 (testimony of [REDACTED]).

209. Similar prompts and measurements were in the ABA Treatment Plan. Pet. Ex. 4, p. 14 (“2 prompts in 4 out of 5 opportunities”); p. 6 (“2 prompts to participate and follow the rules in 2 out of 7 opportunities”).

210. Although the Undersigned agrees that a time component would improve the goal, the Undersigned finds that the weight of evidence supports Respondent's position that the IEP goal was measurable and appropriate for [REDACTED]

### ***Service Delivery***

211. According to Ms. [REDACTED] the service delivery outlined in the IEP was inappropriate because it called for daily 20-minute sessions of social skills instruction but [REDACTED] had no social/emotional goal. Tr. Vol. 2, p. 214. Ms. [REDACTED] also stated it was inappropriate because while there was a behavior goal, there was no service delivery related to the behavior goal. Ms. [REDACTED] provided no opinion as to what she felt would be an appropriate amount of service delivery, and Petitioners offered no other criticism or critique regarding the service delivery outlined in the IEP.

212. Furthermore, Ms. [REDACTED] explained that when IEP teams complete this portion of the IEP, the computer program used by the District (called "CECAS") provides a drop-down menu to select from. Tr. Vol. 11, p. 62. She indicated that the drop-down menu does not allow the team to identify "behavior" instruction, but that the drop-down menu does include a label for "social emotional" instruction. Tr. Vol. 11, p. 62.

213. According to Ms. [REDACTED] testimony regarding CECAS, the label given to the 20-minutes sessions agreed upon by the team was a function of the categories listed in the program, and Ms. [REDACTED] indicated that [REDACTED]'s behavior goal would be considered a social emotional goal. Tr. Vol. 11, p. 62.

214. Ms. [REDACTED] provided [REDACTED] with his daily social skills instruction, and that during that time, she worked on his behavior goal.

215. The Undersigned finds that Petitioners have failed to demonstrate that the service delivery reflected in the IEP was intended to serve some purpose other than instruction on his behavior goal. To the extent Petitioners contend that the service delivery in the IEP was flawed, Undersigned finds that the weight of the evidence supports the service delivery in the IEP as being appropriate for [REDACTED]

### ***Supplemental Aids and Services***

216. Petitioners contend that the supplemental aids and services provided in the IEP were inappropriate because they were "general strategies" that were not specific to [REDACTED] and that the team could not predict at that time what impact the strategies might have on [REDACTED] Tr. Vol. 2, p. 212 (testimony of [REDACTED])

217. According to Ms. [REDACTED] if the impact of a strategy were unknown, it could not be implemented in an IEP. *See id.*

218. Ms. [REDACTED] also suggested that the supplemental aids and services provided were inadequate because they did not include a requirement for staff training. Tr. Vol. 2, p. 213.

219. Ms. [REDACTED] contradicted Ms. [REDACTED] conclusion, stating that it was “extremely appropriate” to put the accommodations listed in place for [REDACTED] rather than wait until the team could obtain additional data. Tr. Vol. 11, p. 60.

220. In her opinion, Ms. [REDACTED] testified that the supplemental aids and services included for [REDACTED] would not negatively impact [REDACTED]. Tr. Vol. 11, p. 64.

221. There is no requirement under the IDEA that reflects Ms. [REDACTED] preference that supplemental aids and services be implemented prior to inclusion in an IEP. There is likewise no requirement under the IDEA that staff training be included among supplemental aids and services.

222. Ms. [REDACTED] was inconsistent in the application of her preference for implementation of a supplemental aid/service before placing it in the IEP. While she was critical of the IEP team’s decision to include supplemental aids and services without having gathered specific data on their effectiveness for [REDACTED], she was also critical of the team’s refusal to provide [REDACTED] with a one-on-one assistant at the February 2 IEP meeting, despite the team having no data to support this level of support. Tr. Vol. 2, pp. 255-256. Notably, Ms. [REDACTED] did not identify any information indicating that the team had taken data on the impact a one-on-one aide might have on [REDACTED] behaviors before implementing this support, yet she testified that this support was appropriate. *See id.* (noting only that the parents had specifically requested a one-on-one aide).

223. The Undersigned finds Ms. [REDACTED] inconsistent application of her preference for assessment of supplemental aids and services before implementation limits the probative value of her critique of this particular component of the IEP.

224. The Undersigned finds that Petitioners did not present sufficient evidence to support their assertion that the IEP goal, service delivery, supplemental aids/accommodations were inappropriate, and that none of these components rendered the February 2 IEP or February 25 IEP inappropriate.

### ***Behavior Support Plan***

225. During the February 2 meeting, the IEP team also developed a Behavior Support Plan (“BSP”) for [REDACTED]. Stip. Ex. 65.

226. A Behavior Support Plan as a document commonly used in Onslow County Schools for students who are relatively new to the school system and suddenly exhibit maladaptive behaviors. Tr. Vol. 11, p. 36 (testimony of [REDACTED]). The BSP lists specific supports and interventions to be provided to the student by his/her instructors. Tr. Vol. 11, pp. 36-37 (testimony of [REDACTED]).

227. Ms. [REDACTED] description of the BSP was consistent with Ms. [REDACTED]. The BSP “targets particular behaviors and specifies what we are going to do, how we are going to respond to that student, so that we are all consistent throughout the school environment [and] are all giving him the same language and same cues.” Tr. Vol. 13, p. 54 (testimony of [REDACTED]).

228. Sometimes the BSP is a precursor to a Functional Behavior Assessment (“FBA”) Tr. Vol. 11, pp. 36-37 (testimony of [REDACTED])

229. Generally, an FBA would be appropriate for a student if the interventions provided by a BSP were not working to support the student. Tr. Vol. 11, p. 95 (testimony of [REDACTED])

230. [REDACTED]’s BSP identified two behavior priorities for [REDACTED] based on how [REDACTED] maladaptive behaviors were currently impeding his learning, and then specified antecedent, reinforcement, and corrective strategies to be implemented by [REDACTED]’s teachers. *See* Stip. Ex. 65.

231. The IEP Team chose strategies for the BSP based on their review of documents and observations from [REDACTED]’s prior enrollment at [REDACTED] and [REDACTED] Tr. Vol. 13, pp. 56-57 (testimony of [REDACTED])

232. The BSP also included an “Approach to Defusing Escalation” section which spelled out specific intervention strategies to be implemented by staff during various phases of the escalation cycle. *See* Stip. Ex. 65, pp. 308-309.

233. [REDACTED]’s parents opposed inclusion of CPI holds in the crisis plan, but the team ultimately decided to include physical restraint as a last-resort intervention in the peak phase only, to ensure [REDACTED]’s safety and the safety of others. *See* Tr. Vol. 13, p. 64 (testimony of [REDACTED])

234. Even if restraint was not in the crisis plan, school staff could still legally use reasonable physical restraint to ensure and protect the safety of [REDACTED] and others.

235. Petitioners contend that [REDACTED]’s BSP was inappropriate primarily because the IEP team did not first conduct a Functional Behavior Assessment. Third Petition, ¶ 28.

236. According to Ms. [REDACTED] developing a behavior support plan before conducting a Functional Behavior Assessment would be “reckless.” Tr. Vol. 2, p. 216.

237. However, Ms. [REDACTED] disagreed and said that had she been involved in the development of [REDACTED]’s IEP in February 2016, she would have followed the same course of action implemented by his team. Tr. Vol. 11, pp. 95-96 (testimony of [REDACTED]) Ms. [REDACTED] would have first developed and implemented a Behavior Support Plan, gathered more information about the utility of the interventions identified in that plan, and based on that, requested testing for an FBA. *Id.*

238. Ms. [REDACTED] described the subsequent point at which the team requested and agreed to conduct an FBA (the February 24 IEP meeting, discussed below) as “perfect timing.” Tr. Vol. 11, p. 96: 4.

239. [REDACTED]’s Petitioners’ private BCBA therapist, was not at all surprised that the IEP team had not yet conducted a behavior assessment prior to the February 24 meeting. Ms. [REDACTED] suggested adding some strategies to the Behavior Support Plan, which the team ultimately did include. Tr. Vol. 4, pp. 147-148.

240. As there is no legal requirement for an FBA prior to development of a BSP, the Undersigned finds that the absence of an FBA before development of [REDACTED]'s BSP does not render it or the IEP inappropriate.

241. Petitioners also contend that [REDACTED] BSP lacked several important elements, such as operational definitions of problem behaviors, the functions of the behaviors, clearly defined strategies, a description of data to be collected, an emergency/crisis plan, and a plan for staff training. Third Petition, ¶ 28.

242. To support their position, Petitioners relied solely on testimony by Ms. [REDACTED] and a report she completed that critiqued the BSP developed on Feb. 2. *See* Pet. Ex. 74, p. 793.

243. Ms. [REDACTED] developed her own method of gauging the fidelity of the Board's BSP by compiling a list of six "critical elements" of a BSP. Tr. Vol. 2, p. 219. The elements, per her report, are as follows: 1. statement of behaviors target for reduction; 2. statement of function; 3. antecedent, competing behavior, and consequence strategies; 4. data collection; 5. emergency/crisis plan; and 6. staff training procedures. Pet. Ex. 74, pp. 793-795.

244. According to Ms. [REDACTED] she determined that these six elements were required for a BSP based on "information from the DPI website and from PBIS." Tr. Vol. 2, p. 219 (testimony of [REDACTED] Ms. [REDACTED] did not identify any other source for these elements.

245. However, per Ms. [REDACTED] none of the six elements identified by Ms. [REDACTED] are required for a BSP. Tr. Vol. 11, pp. 85-88 (testimony of [REDACTED]

246. The Undersigned found Ms. [REDACTED] testimony about the six fidelity elements very confusing such that it had little probative value.

247. The Undersigned did, however, agree with Ms. [REDACTED] that the BSP was similar to a BIP.

248. Ms. [REDACTED] referred [REDACTED]'s BSP appropriately during her testimony, in her report critiquing the plan, she never called it a BSP; instead, she repeatedly referred to as a "BIP." *See* Pet. Ex. 74, p. 79.

249. The Undersigned finds, although called a Behavior Support Plan, the BSP functioned essentially like a Behavior Intervention Plan with many of the same components, though not as detailed. *Compare* Stip. Ex. 88, pp. 426-431 to Stip. Ex. 122, pp. 518-522.

250. The BSP and BIP were written on Exceptional Children's Division letterhead; targeted the same behaviors of aggression and non-compliance; asked 'how do these behaviors impede learning?'; had antecedents with procedures/replacement behaviors; and detailed reinforcement strategies, corrective strategies, approach to defuse escalation, phases and behavior of the escalation cycle, roles/responsibilities sections. *Compare* Stip. Ex. 88 to Stip. Ex. 122.



251. Ms. [REDACTED] suggested that several strategies included in the plan, such as deep breathing and movement breaks, were non-evidenced based strategies and thus were inappropriate for [REDACTED] Tr. Vol. 2, p. 222.

252. Although not all of the strategies were evidence based, several of the strategies included in the plan, such as visual schedules and verbal prompting, were indeed research-based strategies. Tr. Vol. 11, p. 87 (testimony of [REDACTED])

253. It is appropriate to include non-research-based interventions in a BSP where the team believes those supports may help a student. Tr. Vol. 11, pp. 87-88 (testimony of [REDACTED])

254. Ms. [REDACTED] testified that the BSP must include a crisis plan and staff training procedures but that [REDACTED]'s BSP lacked both. Tr. Vol. 2, p. 225.

255. The "Approach to Diffusing Escalation" section of the BSP provided an appropriate plan for teachers to respond to [REDACTED]'s escalating behaviors. See Tr. Vol. 11, p. 128 (testimony of [REDACTED])

256. Further, staff training procedures are not required for a BSP. Tr. Vol. 11, pp. 129-130 (testimony of [REDACTED]) Although, staff would have to have CPI training to use CPI holds.

257. The Undersigned finds that even if [REDACTED]'s BSP did lack some of the six criteria identified by Ms. [REDACTED] in her report, that would still not render the BSP or IEP inappropriate as OCS staff, along with the Petitioners' private BCBA therapist, were attempting to determine appropriate behavior interventions and strategies during the limited period [REDACTED] was in attendance.

### **IEP Implementation**

#### ***From February 9 to February 24, 2016***

258. After almost a four-month absence and the February 2, 2016 IEP Meeting, [REDACTED] returned to [REDACTED] on February 9, 2016. See Stip. Ex. 9.

259. Upon his return on February 9, according to Ms. [REDACTED] seemed to be a different child than the one who entered her classroom at the start of the school year. See Tr. Vol 14, p. 35 (testimony of [REDACTED]) demeanor was different and not same excitement in activities. Also upon [REDACTED] return, [REDACTED] was particularly disengaged with academic work, engaged in much more physical aggression, was eloping, and struggled with work completion immediately. See Tr. Vol. 14, pp. 25-27 (testimony of [REDACTED])

260. [REDACTED] attendance log reflects that for the following three weeks, on the days [REDACTED] attended school, he frequently arrived at school several hours late or left school hours before the instructional day had ended. See Stip. Exs. 9 & 11.

261. According to school records, for the period between February 9 and February 24, 2016, [REDACTED] attended school for only two (2) full days and eight (8) partial days. Stip. Ex. 95, p. 447; *see also* Tr. Vol. 13, p. 59 (testimony of [REDACTED]).

262. Both Ms. [REDACTED] and Ms. [REDACTED] provided extensive testimony regarding the instruction and supports they provided [REDACTED] during this period.

263. They collaborated in anticipation of [REDACTED] return to [REDACTED] by sharing information regarding [REDACTED]s short period of attendance at the school in the fall and preparing [REDACTED]s cool-down spot. (Tr. Vol. 13, p. 45; Tr. Vol. 14, pp. 26-27); and worked together to develop packets of materials for each of [REDACTED]s encore teachers, to ensure his Behavior Support Plan and cool-down spot were implemented consistently across settings. (Tr. Vol. 13, pp. 43-44, 65-66; Tr. Vol. 14, pp. 27-28).

264. Ms. [REDACTED] met with her classroom assistant, Ms. [REDACTED] on after the February 2 IEP meeting to review [REDACTED]s plan and discuss how to make modifications for him. She also made the IEP and Behavior Support Plan accessible to all aides who worked with [REDACTED]. Tr. Vol. 14, p. 43.

265. Ms. [REDACTED] introduced herself to [REDACTED] on Feb. 9, 2016, and worked with him in Ms. [REDACTED] classroom. Stip. Ex. 132, p. 608.

266. As result of [REDACTED] intermittent attendance and the school's closure due to inclement weather, Ms. [REDACTED] held her first session of direct instruction with [REDACTED] in her EC classroom on February 16, 2016. *See* Stip. Ex. 132, p. 609.

267. Ms. [REDACTED] sessions typically included viewing a short video that modeled positive and negative behaviors linked to a specific emotion, discussion of any behavioral incidents that had occurred that day, and a social story related to [REDACTED] most recent behavioral incidents or issues. Tr. Vol. 13, pp. 50-52 (testimony of [REDACTED]). During those sessions, [REDACTED] could express what he was feeling and thinking and Ms. [REDACTED] was able to focus her instruction on self-regulation coping strategies (like deep breathing), which targeted [REDACTED]s behavioral goal. Tr. Vol. 13, pp. 52-53 (testimony of [REDACTED]). This social skills instruction was consistent with both Ms. [REDACTED] and [REDACTED] recommendations.

268. Ms. [REDACTED] description of the instruction she provided echoed Ms. [REDACTED] testimony regarding instruction that Ms. [REDACTED] said she had found beneficial for children with maladaptive behavior (and that she said she envisioned for [REDACTED]). Tr. Vol. 4, pp. 150-151; *see also* Pet. Ex. 4, p. 13-16.

269. [REDACTED]s IEP and BSP listed myriad supports and strategies for [REDACTED] including the use of visual schedule and the strategies of preview, pre-teach and review expectations prior to transitions. Stip. Ex. 65; Stip. Ex. 81, p. 404. Ms. [REDACTED] developed an interactive visual schedule for [REDACTED] which she helped him use to anticipate transitions. Tr. Vol. 14, p. 28-30 (testimony of [REDACTED]).

270. The IEP and BSP also listed positive attention from adults as a strategy. *See* Stip. Ex. 65, p. 307 Stip. Ex. 65.

271. Ms. [REDACTED] also provided positive attention while teaching [REDACTED] and [REDACTED] received all four dinosaur stickers for each of his sessions, and Ms. [REDACTED] noted his progress in her anecdotal notes. Tr. Vol. 13, p. 149.

272. During this same period, [REDACTED]'s inconsistent and typically short periods of attendance did preclude Ms. [REDACTED] special education teacher, from getting to know and understand more about [REDACTED] quickly, and interfered with behavior modification by limiting teachable moments on campus. Tr. Vol. 13, p. 80-81 (testimony of [REDACTED])

273. The IEP team included "preferential seating" among supplemental aids and services. Stip. Ex. 81, p. 404. Ms. [REDACTED] positioned [REDACTED]'s desk to ensure [REDACTED] proximity to other instructors (including his one-on-one) and to a strong student who modeled appropriate behaviors for [REDACTED] Tr. Vol. 14, p. 33:2-12 (testimony of [REDACTED]) [REDACTED] also had a specific area for seating at carpet time, to ease that transition. *See* Tr. Vol. 14, p. 33 (testimony of [REDACTED])

274. [REDACTED] BSP also called for use of rewards as positive reinforcement strategies. *See* Stip. Ex. 65, p. 307. Ms. [REDACTED] implemented a rewards chart for [REDACTED] that displayed five tokens, each of which represented a prefer activity (including computer time, Legos, and reading); if [REDACTED] finished [REDACTED] specific task early or on time, [REDACTED] could choose one of the activities. Tr. Vol. 14, pp. 30-31.

275. Because of [REDACTED] communication deficits due to [REDACTED] Autism, the IEP specifically indicated that instructors should break directions and assignments into smaller segments using clear language. Stip. Ex. 81, p. 404. Ms. [REDACTED] Ms. [REDACTED] and later [REDACTED] one-on-one aide, [REDACTED] broke down tasks into smaller segments and walked [REDACTED] through those segments one by one. Tr. Vol. 14, pp. 42-43 (testimony of [REDACTED])

276. Ms. [REDACTED] and [REDACTED] assistants also were cognizant of the language they used to communicate with [REDACTED] and used straightforward language and indicate their expectations. Tr. Vol. 14, pp. 43-44 (testimony of [REDACTED])

277. At the initial IEP meeting, the IEP team agreed that [REDACTED] would receive support from an occupational therapist with [REDACTED] fine motor and sensory processing skills. Stip. Ex. 81, p. 403. Ms. [REDACTED] observed the occupational therapist bring several supports to her classroom, including pencil grips, a weighted vest, and an angled seat that [REDACTED] particularly liked. Tr. Vol. 14, pp. 48-50 (testimony of [REDACTED])

278. Additionally, [REDACTED]'s IEP included provision of choices as an accommodation. Stip. Ex. 65, p. 307. Ms. [REDACTED] informed [REDACTED] via email that she and Ms. [REDACTED] provided [REDACTED] choices when he demonstrated that [REDACTED] did not want to comply with directions (including redirection to his cool down spot and working with a different group). Stip. Ex. 168, p. 1055.

279. Although his IEP did not provide for the support of a one-on-one aide initially, prior to the addition of this accommodation at the February 24 IEP meeting, Ms. [REDACTED] teaching assistant, Ms. [REDACTED] acted as [REDACTED]'s aide and provided direct support. *See* Tr. Vol. 14, p. 43 (testimony of [REDACTED]).

280. Ms. [REDACTED] was confident she had implemented [REDACTED]'s IEP and Behavior Support Plan. Tr. Vol. 14, p. 51.

281. Consistent with the February 2 IEP progress monitoring, [REDACTED]'s teachers maintained anecdotal notes of [REDACTED]'s performance during his limited attendance. *See* Tr. Vol. 13, pp. 36-37 (testimony of [REDACTED]). The notes were intended to track [REDACTED]'s behaviors, so that [REDACTED] teachers knew what happened with [REDACTED] and could learn more about what strategies worked and didn't work, and what triggered [REDACTED]. Tr. Vol. 14, p. 119: 6-22 (testimony of [REDACTED]).

282. Petitioners contend that [REDACTED]'s February 2 IEP and BSP were not adequately implemented at [REDACTED]. Fourth petition, Claims for Relief, ¶ 7. In support of their position, Petitioners offered the testimony of Ms. [REDACTED] and [REDACTED].

283. Ms. [REDACTED] did not observe [REDACTED] during his enrollment at [REDACTED] or speak with or subsequently observe any of [REDACTED]'s teachers or instructors. Tr. Vol. 3, p. 158: 9-13; Tr. Vol. 4, p. 80: 11-15. Her testimony regarding the period of [REDACTED]'s enrollment in Onslow County Schools is based on her review of the following: 1. records provided in response to Petitioners records request and discovery requests; 2. proposed exhibits exchanged by the parties in advance of the hearing in this matter; 3. transcripts of Petitioners' depositions of [REDACTED] Principal [REDACTED], [REDACTED] EC teacher [REDACTED], and kindergarten teacher [REDACTED].

284. Ms. [REDACTED] acknowledged that her opinions about [REDACTED]'s experience at [REDACTED] were limited because they were based merely on her review of the information included in records. Tr. Vol. 2, p. 252; Tr. Vol. 3, p. 157.

285. Many of the records upon which Ms. [REDACTED] based her testimony were anecdotal or disciplinary records.

286. Ms. [REDACTED] was unaware who had recorded the anecdotal notes. *See* Tr. Vol. 2, p. 234 (testimony of [REDACTED]). Ms. [REDACTED] also did not know when the notes for a specific date or incident were recorded.

287. Ms. [REDACTED] testimony at several points during the hearing also revealed that in the absence of reviewing a written record of a fact, incident, or action at issue, she assumed it must not have occurred. Tr. Vol. 2, p. 246:23 – p. 247:22. (no indication of CPI on February 17) (cool-down strategies had not been implemented). *See* Tr. Vol. 2, p. 269.

288. To the extent Ms. [REDACTED] and Petitioners suggest that the absence of documentation in anecdotal notes of a specific strategy or components of [REDACTED] IEP or BSP demonstrated that the strategy or component was not implemented, the Undersigned rejects this premise as shifting the burden of proof articulated at N.C. Gen. Stat. § 115C-44(b).

289. Based on their past history during the Fall semester at [REDACTED] [REDACTED] parents had demanded that neither Ms. [REDACTED] nor Ms. [REDACTED] interact with [REDACTED] after [REDACTED] re-enrolled. Tr. Vol. 13, p. 67; Stip. Ex. 169, p. 1668 (testimony of [REDACTED]). Both Ms. [REDACTED] and Ms. [REDACTED] were CPI trained members of [REDACTED] Crisis Team, and that they often were first responders when a student was in crisis. See Tr. Vol. 13, p. 67 (testimony of [REDACTED]).

290. [REDACTED] staff honored that request, and as result, during the few instances when [REDACTED] crisis plan was implemented, it fell to Ms. [REDACTED] to serve as the first responder from the Crisis Team. Serving as the first responder while also building a rapport with [REDACTED] was not Ms. [REDACTED] preference, but that she did so in order to honor the parents' request. Tr. Vol. 13, pp. 67-68 (testimony of [REDACTED]). Ms. [REDACTED] has maintained CPI certification since 2009. Tr. Vol. 13, p. 126.

291. On February 18, 2016, Ms. [REDACTED] implemented a CPI hold in response to [REDACTED]'s aggressive behavior in the computer lab. Tr. Vol. 13, p. 88-89 (testimony of [REDACTED]). Stip. Ex. 84.

292. CPI protocols provide that instructors respond differently to a student's behavior depending upon what stage the student is in the "behavior escalation cycle." Tr. Vol. 13, p. 94 (testimony of [REDACTED]).

293. On February 18, when Ms. [REDACTED] arrived in the computer lab, she observed that [REDACTED] was physically aggressive and was attempting to destroy school property by hitting and banging items. Tr. Vol. 13, pp. 90-91; see also, Stip. Ex. 84 (Ms. [REDACTED] written documentation of the incident).

294. [REDACTED] was not responsive to attempts to redirect him and that he did not respond to Ms. [REDACTED] attempt to redirect him to use a specific self-regulation strategy and his behaviors continued to escalate. Tr. Vol. 13, pp. 91-92 (testimony of [REDACTED]).

295. Based on what Ms. [REDACTED] observed when she arrived in the room, she concluded that [REDACTED] was in the peak phase of the behavior escalation cycle. Tr. Vol. 13, p. 89.

296. Once [REDACTED] raised his arm up to a staff member, Ms. [REDACTED] assumed the stance for implementation of the Child Control Position. Tr. Vol. 13, p. 92.

297. During her testimony, Ms. [REDACTED] demonstrated the Child Control Position she had implemented with [REDACTED] on Feb. 18, 2016. Tr. Vol. 13, p. 93.

298. When implementing this form of CPI hold, the student's arms are "[c]rossed above the chest, and lifted so as not to put any pressure on the lungs and restrict breathing." Tr. Vol. 13, p. 93. The adult stands at a slight angle, while the student's body is straight. *Id.* (testimony of [REDACTED]) see also, Pet. Ex. 27, p. 113 (illustration of Child Control Position).

299. Ms. ██████ said the entire hold lasted less than 30 seconds. Tr. Vol. 13, p. 93.

300. As result of this incident, Ms. ██████ suggested an IEP be meeting be scheduled for the following week. Tr. Vol. 13, p. 97; *see also* Stip. Ex. 84, p. 419.

301. Based purely on her review of Ms. ██████ restraint documentation, Ms. ██████ concluded that Ms. ██████ had implemented the restraint inappropriately. *See* Tr. Vol. 2, p. 247 - 249. Ms. ██████ testified that Ms. ██████ documentation provided “no indications that the supportive behaviors at early stages of escalation were [] used to try to calm him.” *Id.* at 247. Thus, Ms. ██████ suggested that no supportive behaviors had been attempted by staff during the early stages of escalation. *See id.*

302. Ms. ██████ admitted on cross-examination that she was unaware that restraints are lawful in North Carolina for purposes including protecting the safety of students and employees, self-defense, maintaining order, and preventing property damage. Tr. Vol. 3, pp. 81-84. Ms. ██████ was also unaware that North Carolina law requires that use of restraints be reported to school principals only when there is observable physical injury to a student. Tr. Vol. 4, p. 84; Tr. Vol. 3, pp. 81-85. However, Ms. ██████ specifically testified that the statutory provisions governing restraint in North Carolina did not influence the opinions she expressed. Tr. Vol. 3, p. 82.

303. The Undersigned finds that Ms. ██████ testimony reflected her preference for use of specific practices in implementing restraints, but that it did not accurately reflect or factor controlling North Carolina law. The Undersigned has weighed her testimony accordingly.

304. Further, the Undersigned finds that improper use of a physical restraint is outside the jurisdiction of this Tribunal.

#### ***February 25, 2016 IEP***

305. The IEP Team reconvened on February 24, 2016 at the parents’ request to “re-address transportation” and “get started on the FBA”. Stip. Ex. 169, p. 1706. *See* Stip. Ex. 96. ██████ parents and Ms. ██████ participated in the meeting. *Id.* at 468.

306. Petitioners conceded in their Third Petition that at this meeting, the team “added intensive support personnel throughout the school environment as an accommodation/modification” and updated parent concerns to reflect the parents’ report of increasing behaviors. Third Petition, ¶ 31.

307. Ms. ██████ opined that the addition of one-on-one support for ██████ at this point was an appropriate level of support and accommodations. Tr. Vol. 11, p. 97.

308. Ms. ██████ also opined that this degree of one-on-one support was appropriate. Tr. Vol 2, p. 256.

309. ██████ stated that she had requested a one-on-one aide for ██████ as early as December 2015 and that she requested this support again at the February 2 IEP meeting. *See* Tr. Vol. pp. 171-172. Petitioners did not offer documentary evidence or further testimony to support this assertion.

310. To the extent Petitioners suggest that the absence of this specific accommodation in the February 2 IEP rendered it inappropriate, the Undersigned finds that per Ms. ██████ testimony, ██████ effectively did have one-on-one assistance during his first three weeks of school. *See* Tr. Vol. 14, p. 43.

311. Petitioners also contend that the February 24 IEP was inadequate, because it did not include changes to the existing behavior goal or add new goals. Third Petition, ¶ 32.

312. According to Ms. ██████ much of the team's discussion at the February 24 IEP team meeting focused on the use of restraints, which ██████'s parents strongly opposed, instead of the IEP.

313. EC Director ██████ explained at the February 24 IEP meeting that CPI holds were necessary at times for safety, but emphasized that they were only to be used as a last resort. Stip. Ex. 92, pp. 30-33.

314. Ms. ██████ explanation of use of CPI holds was consistent with Ms. ██████ prior testimony regarding appropriate use of restraints and ██████'s BSP.

315. At no time during the meeting did Ms. ██████ voice opposition to inclusion of CPI holds as a last resort.

316. At one point during the meeting, Ms. ██████ began to offer input about manipulating antecedents with ██████ based on her work with ██████ at his home, and ██████ interrupted her and insisted that she not speak about anything that happened during in-home sessions. Stip. Ex. 92, pp. 48-49.

317. Ms. ██████ observed ██████ interrupt Ms. ██████. Ms. ██████ said that ██████'s actions left the team without information that could have helped them make decisions. Tr. Vol. 14, pp. 72-73.

318. The IEP team made changes to the BSP during this meeting, refining the antecedents for ██████ first behavior priority to note that ██████ was specifically triggered by adult instruction regarding a non-preferred activity. Stip. Ex. 88, p. 426. Team members engaged in robust discussion of reinforcement strategies for ██████. Stip. Ex. 92, 2:16:08 – 2:17:08. Ms. ██████ specifically suggested that the team include timed waiting, to ensure adults were following through on providing ██████ time to comply with instructions, and the team included this strategy in the updated plan. Stip. Ex. 88, p. 428 (specifying that adults would grant ██████ one minute to respond). The team also added choices, movement breaks, and "preview, preteach and review expectations prior to transitions" as reinforcement strategies. *Id.*

319. During this meeting, the IEP team also agreed to gather ABC data to inform a Functional Behavior Assessment for ██████. *See* Stip. Ex. 92, 2:14:50 to 2:15:09.

320. Ms. [REDACTED] specifically described to [REDACTED] and [REDACTED] that school psychologist [REDACTED] would conduct more purposeful observations for the FBA that would also help the team refine [REDACTED]'s plan; Ms. [REDACTED] echoed this, specifically noting that the FBA would focus on antecedents and consequences. Stip. Ex. 92, 2:14:50 to 2:15:09. [REDACTED] agreed that they would "lean on [REDACTED]" for observations that would inform the FBA. *Id.*

321. Ms. [REDACTED] opined that the modified Behavior Support Plan was "really very appropriate because adding things just shows that the team is working together to come up with other interventions and strategies that might help." Tr. Vol. 11, p. 93.

***Subsequent Attendance at [REDACTED] After February 24, 2016***

322. After the February 24 IEP meeting, [REDACTED]'s school attendance improved and he began attending for the full instructional day much more frequently. Tr. Vol. 14, p. 60 (testimony of [REDACTED])

323. Even though [REDACTED]'s school attendance improved, he only attended eleven (11) days full-time and three (3) days part-time from February 25 to March 23, 2016.

324. Ms. [REDACTED] testified that [REDACTED]'s aggressive behaviors decreased following his full-time attendance. *Id.*

325. [REDACTED] began receiving support from Ms. [REDACTED] on March 7, 2016 and [REDACTED]'s behavior improved once [REDACTED] began to receive support from Ms. [REDACTED]. See Tr. Vol. 14, pp. 53-54 (testimony of [REDACTED]). Ms. [REDACTED] explained that [REDACTED] would "verbalize more as [REDACTED] started to get frustrated" and utilized more of [REDACTED]'s coping strategies by identifying and expressing [REDACTED]'s feelings rather than internalizing them and that this would help [REDACTED]'s instructors respond quickly to deescalate. See Tr. Vol. 14, pp. 53-54, 121.

326. [REDACTED] admitted that [REDACTED] showed a "drastic change in his behavior" in the two weeks immediately after [REDACTED] began to receive support from Ms. [REDACTED]. Stip. Ex. 169, p. 500; see also Tr. Vol. 9, p. 36.

327. Ms. [REDACTED] and Ms. [REDACTED] continued implementing the "preview, preteach and review expectations" strategy as outlined in his Behavior Support Plan, and they continued using the visual schedule to anticipate transitions as they had been since [REDACTED] returned on February 9. Tr. Vol. 14, p. 71 (testimony of [REDACTED])

328. Ms. [REDACTED] implemented the changes the IEP team had just made to the IEP on February 24. Specifically, she and Ms. [REDACTED] used their phones and watches to keep track of time as they provided [REDACTED] one-minute of planned waiting. Tr. vol. 14, p. 69. Ms. [REDACTED] said they even provided a timer in [REDACTED]'s cool-down spot for ease of access if they needed to use it there. *Id.*



### ***Observations and Data Collection***

329. Ms. [REDACTED] observed [REDACTED] on three separate occasions after the February 24 IEP meeting, at the request of EC Director [REDACTED] Tr. Vol. 12, p. 99.

330. Ms. [REDACTED] first observed [REDACTED] on Thursday, February 25, 2016, during recess. [REDACTED] demonstrated “great social skills as far as interacting and playing nicely” and was initially compliant with the teacher’s instructions to line up and return inside. Tr. Vol. 11, p. 101: 2-4.

331. During the observation on the playground, Ms. [REDACTED] saw [REDACTED] approach the school in her car, at which point [REDACTED] went to the car to talk to his mother. *Id.* at 101:9-21. [REDACTED] spoke with his mother and then returned to [REDACTED] class, but then started exhibiting maladaptive behaviors. Ms. [REDACTED] stated that “unfortunately, between the transition and back from the fence back to the line to go back inside [REDACTED] started to exhibit whining and [REDACTED] started to not want to transition back. [REDACTED] started not to want to walk in the line, either, and he wanted to hang back.” *Id.* at 101:20-25. [REDACTED]’s teacher provided prompts and guidance that helped [REDACTED] improve [REDACTED] behavior, at which point [REDACTED] got back in line. Tr. Vol. 11, p. 102: 1-5.

332. [REDACTED] denied “seeing” [REDACTED] that day, but that she had driven to the school to pick up her daughter. Tr. Vol. 9, p. 21. Yet in an email exchange with Ms. [REDACTED] describing this incident, [REDACTED] indicated that she had seen [REDACTED] outside that day and inquired whether [REDACTED] was wearing [REDACTED] jacket during recess. *See* Stip. Ex. 168, p. 1092. Ms. [REDACTED] stated in her reply to [REDACTED] that she had observed [REDACTED] stop by during recess. *Id.*

333. Ms. [REDACTED] observed [REDACTED] again on February 26, 2016, for nearly the entire school day. She recalled that [REDACTED] exhibited noncompliance including whining behavior, being out of his seat, as well as hitting and kicking the teacher assistant. Tr. Vol. 11, pp. 102-103.

334. Ms. [REDACTED] then met with [REDACTED] teachers after school that day to provide additional strategies they could implement and to discuss maintenance of ABC data for the forthcoming FBA, and the teachers were very receptive to her feedback. Tr. Vol. 11, pp. 17-25 (testimony of [REDACTED])

335. During her meeting with [REDACTED]’s teachers, Ms. [REDACTED] provided ABC data forms for staff to use to gather data to inform the FBA and provided instructions on what behaviors they were targeting through the data collection. Tr. Vol. 11, pp. 104-105; *see also*, Stip. Ex. 129.

336. The ABC data forms completed by staff were intended to serve an entirely different purpose than the anecdotal notes staff maintained in February. Tr. Vol. 12, pp. 38-39 (testimony of [REDACTED]) Instead, the ABC data sheets were completed for the purpose of informing the forthcoming FBA, whereas the anecdotal notes were completed in connection with [REDACTED]’s IEP goal. *Id.*

337. In the following weeks of [REDACTED]'s enrollment, Ms. [REDACTED] and Ms. [REDACTED] filled out the ABC data collection forms and provided them to [REDACTED] the school psychologist responsible for completing the FBA and BIP. Tr. Vol. 14, pp. 84-85 (testimony of [REDACTED]).

338. Ms. [REDACTED] third and final observation of [REDACTED] was on March 23, 2016. During this observation, [REDACTED] interacted positively with his one-on-one aide, Ms. [REDACTED] and that they demonstrated a strong relationship. Tr. Vol. 11, p. 106 (testimony of [REDACTED]).

339. During his observation on March 23, 2016, [REDACTED] began to exhibit maladaptive behavior when he became frustrated that his wrist-watch, which also operated as a phone, made it difficult for [REDACTED] to put on [REDACTED] coat. Tr. Vol. 11, pp. 106 – 107 (testimony of [REDACTED]). [REDACTED] proceeded to call both his mother and father on the watch and express his frustration about the watch; [REDACTED] father answered the call and spoke with [REDACTED] for some time. *Id.* After this incident, she testified, [REDACTED] proceeded to go about his day and transitioned to the library. *Id.* at p. 107.

340. After this third observation and in anticipation of Ms. [REDACTED]'s forthcoming FBA and BIP, Ms. [REDACTED] provided a list of eight strategies specific to [REDACTED] that she suggested be included in the BIP. *See* Tr. Vol. 11, p. 140-142; Stip. Ex. 169, p.1267-1269.

341. Ms. [REDACTED] had observed Ms. [REDACTED] and Ms. [REDACTED] successfully using the majority of the strategies she listed. Tr. Vol. 11, pp. 140-142.

#### ***CPI Holds After February 25, 2016***

342. Due to the success of the IEP and BSP, Ms. [REDACTED] implemented CPI holds on only two separate occasions in March 2016.

343. On March 7, 2016, Ms. [REDACTED] came upon [REDACTED] when [REDACTED] was in the “peak” phase of the escalation cycle, as [REDACTED] was repeatedly kicking Ms. [REDACTED] to the point where Ms. [REDACTED] was crying. Tr. Vol. 13, p. 106. In response, Ms. [REDACTED] implemented the Child Control Position for less than a minute. Tr. Vol. 13, pp. 105-106; Stip. Ex. 100. [REDACTED] demonstrated some further physical aggression as he de-escalated, and Ms. [REDACTED] implemented blocking and redirected [REDACTED] to use a calm-down strategy. Tr. Vol. 13, p. 107. [REDACTED] then proceeded to integrate into [REDACTED] encore class with [REDACTED] peers and participate successfully. Tr. Vol. 13, p. 107.

344. On March 18, 2016, Ms. [REDACTED] entered Ms. [REDACTED] classroom to retrieve [REDACTED] for his daily social skills instruction and observed [REDACTED] yelling, shouting, and shoving Ms. [REDACTED]. Tr. Vol. 13, p. 109. Ms. [REDACTED] tried to redirect [REDACTED]'s behavior to her session, as this strategy had helped [REDACTED] shift his focus and deescalate in the past. Tr. Vol. 13, pp. 109-110. [REDACTED] responded by aiming a large rubber band (“Geoband”) about an inch away from Ms. [REDACTED] face. Ms. [REDACTED] assumed the Child Control Position and implemented a CPI hold for 15-20 seconds. Tr. Vol. 13, pp. 110-111. After Ms. [REDACTED] released [REDACTED] he once again aimed the Geoband at Ms. [REDACTED] and she restrained him a second time for 15-20 seconds. Stip. Ex. 107, p. 247; Tr. Vol. 13, pp. 111-112.

345. After the Geoband incident [REDACTED] proceeded to call his mother on [REDACTED] wrist-watch, told her that [REDACTED] did not feel safe, and that school staff were “chasing him around the room.” Tr. Vol. 13, p. 112.

346. Staff were, in fact, nowhere near [REDACTED] while [REDACTED] spoke to his mother, and in fact were not even moving. Tr. Vol. 13, pp. 112-113 (testimony of [REDACTED]).

347. Likewise, a signed statement by Ms. [REDACTED] describing this incident stated that [REDACTED] told his mother on [REDACTED] watch phone that Ms. [REDACTED] was following him around the room when she was in fact standing “motionless by the sink.” Stip. Ex. 110.

348. [REDACTED] acknowledged that documentation of the incident indicated that after the incident, [REDACTED] was “calm” and willingly walked to the office. Stip. Ex. 109, p. 492; Tr. Vol. 8, pp. 134-135.

349. In response to the incident, [REDACTED] requested that [REDACTED] be removed from Ms. [REDACTED] caseload, called 911, and pursued criminal charges against Ms. [REDACTED] because she felt that the CPI holds was punitive. Tr. Vol. 8, pp. 161-162.

350. Because of [REDACTED] actions, Ms. [REDACTED] was concerned “that there would be no teacher that would be willing to put themselves out there to protect the safety of the students if they were going to have charges filed against them.” Tr. Vol. 13, p. 124 (testimony of [REDACTED]).

351. Unfortunately, in the days that followed, the relationship between Petitioners and school staff further deteriorated.

352. On March 21, 2016, Petitioners reported to [REDACTED] with [REDACTED] and met with EC Director [REDACTED] and Principal [REDACTED] to discuss the March 18 incident.

353. At the end of their meeting, the group proceeded to exit the back office area. Stip. Ex. 165, 5:05-5:33.

354. Video footage from this date captures Petitioners, Ms. [REDACTED] and Ms. [REDACTED] leaving the area of the back office and proceeding to the front office door. In the video, the entire group is approaching the door, with [REDACTED] directly in front of Ms. [REDACTED]. [REDACTED] can be seen abruptly stopping, turning, and pointing her finger near Ms. [REDACTED] body. Stip. Ex. 165, 5:05-5:33.

355. The video does not depict any physical contact between [REDACTED] and Ms. [REDACTED].

356. [REDACTED] took an audio recording of the incident on her cell phone, without staff members’ knowledge. On the recording, [REDACTED] can be heard stating that Ms. [REDACTED] “placed her belly on [her].” Resp. Ex. 3, 4:49-5:48.

357. In their Fourth Petition, Petitioners alleged that Ms. [REDACTED] had “aggressively pushed her body up against [REDACTED] Fourth Petition, ¶ 33.

358. The next day, on March 22, 2016, when Petitioner [REDACTED] dropped [REDACTED] off at [REDACTED] she was asked by Ms. [REDACTED] to ensure that she had removed [REDACTED]'s wristwatch, which operated as a cell phone, from his person, as it was not allowed in classrooms under school policy. Resp. Ex. 4, 0:25-3:44. [REDACTED] refused to do so and insisted that it was only a "watch." *Id.*

359. Later that day, [REDACTED] returned to [REDACTED] [REDACTED] once again recorded her conversations with staff members without their knowledge; she can be heard stating on the recording to one staff member that she is not recording. Resp. Ex. 5, 1:40-3:50; see Tr. Vol. 8, pp. 175-176.

360. The audio recording captures [REDACTED] loudly stating that Ms. [REDACTED] "assaulted" her the day before and asked to check in on [REDACTED] Resp. Ex. 5, 1:40-3:50. [REDACTED] testified that during this exchange, she was directing Ms. [REDACTED] who was standing in [REDACTED]'s proximity, to stay away from [REDACTED] Tr. Vol. 9, p. 42.

361. The same audio recording also captures a conversation between [REDACTED] and Ms. [REDACTED] at which point [REDACTED] has been called to the office. Ms. [REDACTED] is recorded asking [REDACTED] to return his wristwatch to [REDACTED] then a male staff member can then be heard requesting that [REDACTED] comply with Ms. [REDACTED] directions regarding school rules about the watch. Resp. Ex. 5.

362. [REDACTED] testified that during this incident, Ms. [REDACTED] handed [REDACTED] her son's watch, and [REDACTED] then handed it back to [REDACTED] Tr. Vol. 9, p. 41.

363. Although an IEP meeting was scheduled for April 6, 2017, to review the FBA and BIP for [REDACTED] Petitioners canceled the meeting through their attorney and indicated that they were withdrawing both [REDACTED] and his sister from [REDACTED] See Tr. Vol. 9, p. 53; Stip. Ex. 168, p. 978.

364. On April 5, 2017, Petitioners' new legal counsel at the time, [REDACTED], notified counsel for OCS that his clients intended to withdraw their children from [REDACTED] Tr. Vol. 9, p. 57-58; Resp. Ex. 7, p. 163. Counsel for OCS responded the same day and asked that Mr. [REDACTED] urge his clients to reconsider, attend the IEP meeting scheduled for the following day, and work with OCS to collaborate moving forward. See *id.* at pp. 58-59. [REDACTED] testified that she was unaware as to whether Mr. Wickward ever responded to counsel for the OCS.

365. On April 6, 2017, Ms. [REDACTED] emailed [REDACTED] to indicate that she and [REDACTED] remained committed to serving [REDACTED] and urged her to consider moving forward with an IEP meeting. Stip. Ex. 168, p. 978.

366. Neither Petitioners nor their attorney at the time, [REDACTED], reached out to Ms. [REDACTED] after receiving her email. Tr. Vol. 9, p. 57 (testimony of [REDACTED])

#### **Behavioral Progress at [REDACTED]**

367. [REDACTED] showed behavioral progress during his enrollment, specifically citing changes in the duration of escalation cycle phases and centralization of elopements. Tr. Vol. 13, pp. 83-85 (testimony of [REDACTED]) (testimony of [REDACTED]) Although the addition of a one-on-one aide did

not eliminate [redacted]'s maladaptive behaviors altogether, Ms. [redacted] was able to deescalate [redacted] sooner in the escalation cycle. Tr. Vol. 13, p. 100 (testimony of [redacted])

368. "Over time [Ms. [redacted]] felt like he became less aggressive. [redacted] wasn't hitting as much. [redacted] was starting to verbalize when he was getting frustrated as opposed to the beginning. [redacted] was learning the routine and expectations. [redacted] started to understand better the transitions from our day-to-day and how our schedule flowed. [redacted] was completing more things. We were still working on completion but the amount was increasing." Tr. Vol. 14, pp. 85-86 (testimony of [redacted]) [redacted]'s elopements were less frequent over time and [redacted] had made progress during this time frame. Tr. Vol. 14, p. 86.

369. Throughout [redacted]'s enrollment at [redacted] Ms. [redacted] role as the first responder in implementing restraints did not affect [redacted]'s attitude towards working with her. Tr. Vol. 13, p. 114 (testimony of [redacted]) [redacted] participated in his daily services with Ms. [redacted] just hours after the March 18 restraint, transitioning well and engaging in all activities successfully. Tr. Vol. 13, pp. 115-116.

370. On March 22, 2016, the same day [redacted] engaged in a heated exchange with Ms. [redacted] regarding [redacted] watch, Ms. [redacted] provided a social skills lesson to Ms. [redacted] entire class (as a result of the parents' request that individual sessions cease). [redacted] "was very excited and jumped up to introduce [Ms. [redacted]] and tell the students about our Teach to Talk videos and my treasure box," and asked if he could go to Ms. [redacted] classroom. Tr. Vol. 13, pp. 116-117 (testimony of [redacted]) Stip. Ex. 132, p. 464.

371. On March 23, 2016, [redacted]'s final day at [redacted] he "cheerfully greeted" Ms. [redacted] while transitioning and asked if he was going to her room that day. Tr. Vol. 13, pp. 115: 1-6 (testimony of [redacted])

#### ***Educational Harm and Reflexive Conditioned Motivating Operations ("CMOR")***

372. Petitioners contend that subsequent to the February 24 IEP meeting, [redacted]'s updated IEP and BSP were not adequately implemented at [redacted] Fourth Petition, Claims for Relief, ¶ 7. More specifically, Petitioners contend that the interventions implemented by staff "were teaching [redacted] to engage in maladaptive behavior including elopement and refusal." Third Petition, 33. They further contend that as result, [redacted] developed "chronic and severe anxiety and fear regarding school." Initial Petition, 29.

373. In support of their position, Petitioners offered the testimony of [redacted] Ms. [redacted] and Ms. [redacted]

374. According to [redacted] "the behaviors that [she] was seeing at Onslow County Schools, I had not seen them to be that extreme in any other setting to include my home, and that was very concerning to me, and they were only getting worse." Tr. Vol. 8, p. 102:7-11.

375. In support of Petitioners' position regarding inappropriate implementation of the IEP and BSP, Ms. ██████ testified that, generally, failure to monitor a behavior plan may result in harm to a student. Tr. Vol. 2, p. 225 (testimony of ██████).

376. Ms. ██████ opined that while he was enrolled at ██████ ██████ showed signs that he had developed a condition called Reflexive Conditioned Motivating Operation ("CMOR"). Tr. Vol. 3, p. 28. Ms. ██████ testified that incidents captured in anecdotal notes that described ██████ as saying "no" or escaping in response to a demand showed that he was struggling with this condition. Tr. Vol. 3, p. 38. Ms. ██████ testified that there were "multiple instances that his behavior indicates . . . that the presence of educational materials and instructional demands was a signaling of worsening conditions." *Id.*

377. Ms. ██████ testified that a specific anecdotal note indicating that ██████ stated "I feel like I'm going to leave," also showed that he had developed this condition. Tr. Vol. 2, p. 266; *see* Stip. Ex. 130, p. 561. Ms. ██████ said that this anecdotal note alone "indicat[ed] that school ha[d] become an aversive condition and there's motivation to escape it." *Id.* at 266.

378. Specific to ██████ Ms. ██████ opined that "actual harm [] was done by neglecting to do appropriate assessments on his behavior before implementing behavior modification strategies and lack of appropriate monitoring of those strategies once they did employ them." Tr. Vol. 4, p. 77.

379. Ms. ██████ further acknowledged that she first met ██████ in January 2017, and thus had not observed him prior to, during, or in the year after the period in question at ██████ Tr. Vol. 1, p. 75.

380. Contrary to Ms. ██████ testimony, Ms. ██████ testified to an observation of ██████ that she conducted at ██████ on March 15, 2016. Ms. ██████ also testified that although ██████'s peers struggled with challenging behaviors, ██████ "was like a little bit of a rock star," stayed on task, and participated with the group. Tr. Vol. 4, p. 156:12-16.

381. Though Ms. ██████ noted areas for growth for ██████'s one-on-one assistant and described some of her strategies as "strange," she testified that Ms. ██████ was able to successfully keep ██████ calm and helped him deescalate and redirect his attention to achieve work completion after he became frustrated with progress on his art project. Tr. Vol. 4, p. 158-159.

382. Ms. ██████ observations stand in sharp contrast to Ms. ██████ speculation that ██████ exhibited CMOR at ██████.

383. Although Ms. ██████ speculated as to potential causes of the CMOR she identified in ██████ she could not ascertain whether or not ██████ was exhibiting signs of CMOR prior to ██████ return to ██████ on February 9; after all, she conceded that she did not review records from any of ██████'s prior educational settings or observe him in any of those settings. *See* Tr. Vol. 4, pp. 80-81. As Ms. ██████ is not a clinical psychologist or psychiatrist; therefore, her diagnosis of CMOR carried no weight with the Undersigned.

384. Ms. [REDACTED] speculation that [REDACTED]'s behavioral issues stemmed from the actions (or inactions) of [REDACTED] staff is outweighed by substantial evidence showing that [REDACTED]'s behavioral issues at [REDACTED] were evident in other educational settings, were evident the moment [REDACTED] re-enrolled in February 2016, and were in several instances preceded by interactions with his parents during the school-day.

#### ***FBA Data and Behavioral Progress***

385. Petitioners also relied upon the FBA completed by Ms. [REDACTED] to support their position that [REDACTED] did not make progress at [REDACTED].

386. Ms. [REDACTED] testified that Ms. [REDACTED] based her assessment of behaviors in February on the anecdotal notes maintained, and that she based her assessment of behaviors in March on the ABC data sheets provided by Ms. [REDACTED] and Ms. [REDACTED]. See Vol. 3, p. 15-16.

387. This is consistent with Ms. [REDACTED] description of her methods in the document itself. Stip. Ex. 122, pp. 513-514.

388. Because Ms. [REDACTED] conclusions for February and March were based on different forms of data taken for different purposes, Ms. [REDACTED] conclusions regarding rates of specific behaviors from month to month could not be compared to assess whether [REDACTED] had progressed or regressed. See Tr. Vol. 12, p. 16 (testimony of [REDACTED]).

389. ABC data collection is more likely to yield a higher frequency count for behaviors. See Tr. Vol. 12, p. 17 (testimony of [REDACTED]).

390. The Undersigned finds that because the data sets Ms. [REDACTED] relied upon in her FBA for February and March were taken for different purposes and in different forms, they cannot be relied upon for the purpose of identifying trends in the frequency or intensity of [REDACTED]'s maladaptive behavior. Moreover, the accuracy of this data depends in part, upon a comparison of [REDACTED]'s attendance during this period, which was not done.

391. As [REDACTED]'s parents withdrew [REDACTED] from the District prior to the IEP meeting to discuss the FBA and BIP, the Undersigned finds that Ms. [REDACTED] critique of the FBA and draft BIP was irrelevant to the issue of implementation or appropriateness of [REDACTED]'s IEPs.

392. To the extent that there was testimony on this issue that may be pertinent, Ms. [REDACTED] testimony was contradicted by the testimony of Ms. [REDACTED].

393. Ms. [REDACTED] collaborated with Ms. [REDACTED] on the BIP and that Ms. [REDACTED] incorporated the feedback she had provided via email. Tr. Vol. 11, pp. 106-110; see Stip. Ex. 122. Ms. [REDACTED] opined that the draft BIP was appropriate for [REDACTED]. Tr. Vol. 11, p. 111.

### Enrollment at [REDACTED]

394. [REDACTED] was enrolled at [REDACTED] in April 2016, at which time he was placed in a primary class consisting of students age three to five. At the time, [REDACTED] was six; [REDACTED] and [REDACTED] sister were the oldest students and the only six-year-olds in the class. Tr. Vol. 5, p. 73.

395. In July 2016, [REDACTED] transitioned to Ms. [REDACTED] classroom, which included students age three to six. *See* Tr. Vol. 6, p. 6. As of the final day of the hearing in this matter, both [REDACTED] and his sister had turned seven but were still in Ms. [REDACTED] class. *See id.*

396. Ms. [REDACTED] has not obtained a Bachelor's degree and is not licensed as a teacher in the State of North Carolina or any other state. Tr. Vol. 6, pp. 4-5. Ms. [REDACTED] testified that she has not received training in behavior management. Tr. Vol. 6, p. 7. Although not determinative of the appropriateness of [REDACTED] the Undersigned did consider this as a factor in that determination.

397. [REDACTED] Director [REDACTED] and Ms. [REDACTED] provided extensive testimony about [REDACTED]'s experience at [REDACTED] since his enrollment in April 2016.

398. [REDACTED] has manifested aggressive behavior throughout his time at [REDACTED] including hitting and kicking peers, and hitting and throwing things at teachers. Tr. Vol. 5, pp. 84-85, 90-91 (testimony of [REDACTED] Resp. Ex. 8, pp. 291, 400-403, 407, 409-413. Ms. [REDACTED] testified that [REDACTED]'s behavior was unpredictable and varied by day; she acknowledged that [REDACTED]'s aggressive behaviors toward peers and staff have persisted since his enrollment at [REDACTED] Tr. Vol. 5, pp. 97-98.

399. [REDACTED] has also eloped from the classroom and playground several times since his enrollment, most recently in late January 2017. *See* Resp. Ex. 8, p. 457.

400. [REDACTED] staff responded to [REDACTED]'s maladaptive behavior with the following strategies: 1. calling [REDACTED] on the phone and asking her to speak with [REDACTED] 2. sending [REDACTED] home for the remainder of the day; and 3. restraining [REDACTED] despite no CPI training. *See* Tr. Vol. 5, pp. 85-86, 101 (testimony of [REDACTED] Resp. Ex. 8, p. 404.

401. According to [REDACTED] she was only called by [REDACTED] staff to pick up [REDACTED] due to behavioral issues on one occasion, in February, regarding an incident with a nerf gun. Tr. Vol. 7, pp. 29-30.

402. This was not consistent with the testimony of Ms. [REDACTED] who testified that the school had implemented a rule pertaining to [REDACTED] that required him to go home for the remainder of the day if he eloped to an adjacent fence. Tr. Vol. 6, pp. 40-41. On several occasions, [REDACTED] has been sent home for the remainder of the school day as a consequence for climbing the fence. *Id.*

403. [REDACTED] testified that she and her husband chose to enroll [REDACTED] at [REDACTED] Montessori because the school "believe[s] in handling things peacefully and they did not use CPI holds as [REDACTED] a go to." Tr. Vol. 6, p. 184: 13-14.



404. Although neither Ms. [REDACTED] nor Ms. [REDACTED] have received CPI or other restraint training, they have restrained [REDACTED] a total of six times during the past year. See Tr. Vol. 5, p. 101 (testimony of [REDACTED]).

405. In spring 2016, Ms. [REDACTED] observed [REDACTED] approaching another child with a stick in his hand and with an “aggressive kind of body posture.” She testified that she responded by taking [REDACTED] by the arms and “grab[bing] him to [her] body,” holding him for less than five minutes. Tr. Vol. 5, pp. 14 & 25.

406. Ms. [REDACTED] testified that she restrained [REDACTED] on four separate occasions in September 2016, and then restrained him again in February 2017. Tr. Vol. 6, pp. 38: 3 – 40: 13. Ms. [REDACTED] described her restraints of [REDACTED] as using her arms “like a hug” that restricted [REDACTED]’s movement towards a person or location, but not a “complete restriction of the body.” *Id.*

407. Based on [REDACTED]’s inconsistent testimony throughout the hearing and contradictory testimony provided by all other witnesses who testified regarding [REDACTED], the Undersigned finds that [REDACTED]’s testimony regarding [REDACTED]’s experience at [REDACTED] is inconsistent with that of the [REDACTED] staff.

408. Although Ms. [REDACTED] conducted an observation at [REDACTED] and testified that she reviewed school records, her knowledge of [REDACTED]’s experience at [REDACTED] was severely limited. She was unaware that [REDACTED] staff were not taking or maintaining ABC data regarding [REDACTED]’s maladaptive behaviors, had restrained [REDACTED] several times, and were not CPI trained. Tr. Vol. 4, pp. 49, 51 (testimony of [REDACTED]). She was also not aware that [REDACTED]’s classroom teacher, Ms. [REDACTED] had admitted she did not know anything about autism and consequently could not assess his social needs. Tr. Vol. 4, pp. 50 & 53.

409. The Undersigned finds that Ms. [REDACTED]’s testimony regarding the appropriateness of [REDACTED] and her conclusion that [REDACTED] has been a “safe place to land,” are belied by the testimony of [REDACTED]’s own instructors at [REDACTED].

410. [REDACTED] staff did not document [REDACTED]’s present level of performance when he began at the school, and thus they cannot identify with any specificity whether or not he has grown academically in the last year. Tr. Vol. 5, pp. 71-72.

411. Ms. [REDACTED] and Ms. [REDACTED], both of whom conducted observations at [REDACTED] and [REDACTED] staff themselves testified that [REDACTED] faces few, if any, academic or behavioral demands there because:

- a. During choice time, when children are able to self-select academic works, [REDACTED] is instead able “to choose works that are not, in fact, works,” but are instead toys he’s brought from home or from aftercare used as an incentive for his behavior. Tr. Vol. 5, p. 55 (testimony of [REDACTED]).

- b. "Tasks were severely reduced, and that was one of [her] areas of concern." Tr. Vol. 4, p. 52 (testimony of [REDACTED] received very little direct instruction, completed very little work, and that the little work he did complete was "pretty easy stuff." Tr. Vol. 4, pp. 57-58 (testimony of [REDACTED]
- c. There was a lack of instructional demands, and she surmised that Ms. [REDACTED] had not place educational demands on [REDACTED] in an effort to avoid maladaptive behavior. Tr. Vol. 4, pp. 185-186 (testimony of [REDACTED] *see also*, Resp. Ex. 8, p. 406 (noting that [REDACTED] lies on floor and refuses to do any more work). [REDACTED] "didn't really have an opportunity to be noncompliant," as [REDACTED] could simply get up and move around freely as [REDACTED] wished. Tr. Vol. 4, p. 177: 12-16 (testimony of [REDACTED]
- d. [REDACTED] primary goal at present is to "be peaceful," and that she had previously indicated that work completion was not presently a goal for [REDACTED] Tr. Vol. 5, pp. 101-102 (testimony of [REDACTED]
- e. [REDACTED]s willingness to engage in challenging material at [REDACTED] varies by day, but that generally, [REDACTED] academic progress "has been impeded by his behaviors presently." Tr. Vol. 5, p. 115 (testimony of [REDACTED]

412. Ms. [REDACTED] expressed her opinion that [REDACTED] may not be an appropriate placement for [REDACTED] and in a teacher recommendation form she completed on February 28, 2017, Ms. [REDACTED] noted that [REDACTED] "is cognitively ready for more challenges than are provided within the context of his 3-6 yr old classroom," and said "[REDACTED] been challenged by the flexibility of structure and requirement for self-direction that is the nature of a [REDACTED] environment." Resp. Ex. 8, pp. 470-471.

413. By February 15, 2017, Petitioners' relationship with [REDACTED] deteriorated to the point school administrative reported that [REDACTED] "rant[ed about unacceptable aspects of staff's behavior", "upset, lack of good faith between administration and parents....not able to ensure [REDACTED]s success." Resp. Ex. 8, p. 463. Per [REDACTED]s request, Ms. [REDACTED] completed a teacher recommendation form on February 28, 2017. Resp. Ex. 8, pp. 470-471.

414. On April 3, 2016, [REDACTED] accused a [REDACTED] teacher of provoking and belittling [REDACTED] Resp. Ex. 1, p. 76. Ms. [REDACTED] had observed that day and clarified that the "teacher did not point [REDACTED] out." Resp. Ex. 1, p. 76.

415. [REDACTED] stated in her email that "they had plans to visit other schools..." which indicated that Petitioners admitted [REDACTED] was an inappropriate private placement. *Id.*

### CONCLUSIONS OF LAW

Based on the above Findings of Fact and relevant laws and legal precedent, the Undersigned concludes as follows:

## General Legal Framework

1. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.

3. The Petitioners and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them. Stip. 1.

4. The Petitioners and Respondent named in this action are correctly designated and have been properly noticed of this hearing. Stip. 2.

5. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed. Stip. 6.

6. As the party requesting the hearing, the burden of proof lies with Petitioners and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Stips. 4. & 5. Actions of local boards of education are presumed to be correct; for Petitioners to [REDACTED] their evidence must outweigh the evidence in favor of the Board's decisions. *See* N.C.G.S. 115C-44(b).

7. The IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301. Stip. 7.

8. The controlling state law for students with disabilities in N.C. Gen. Stat. §§ 115C, Article 9 and the corresponding state regulations. Stip. 9.

9. The IDEA was enacted to "ensure that all children with disabilities have [REDACTED] to them a Free Appropriate Public Education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A).

10. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 *et seq.* and is the local education agency responsible for providing educational services in Onslow County, North Carolina. Stip. 8. Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; and N.C. Gen. Stat. 115C-106 *et seq.* Respondent is also subject to the *Policies Governing Services for Children with Disabilities* developed by the State Education Agency. These acts and regulations and policies require the Respondent to provide FAPE for those children in need of special education residing within its jurisdiction. *See* Stips. 6, 7, & 9.

11. At all times relevant to this matter, Petitioners resided in Onslow County, North Carolina. *See* Stip. 13.

12. A school district must offer every student with a disability the opportunity for a free appropriate public education (“FAPE”) through an Individualized Education Plan (“IEP”) that meets the requirements of the IDEA and state standards. 20 U.S.C. 1412(a)(1)(A). 20 USC 1401(9).

### **IEP Appropriateness**

13. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

14. For a reviewing court, “the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Endrew F.*, 137 S.C. at 999. Thus, school districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Bd. of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S.176, 189-90 (1982).

15. An appropriate IEP must do the following: 1. indicate the student’s current level of academic achievement and functional performance; 2. describe how the child’s disability affects his involvement and progress in the general education curriculum; 3. state annual goals; 4. provide a method for progress monitoring; and 5. identify special education and related services for the student. *Endrew F.*, 137 S.Ct. at 994 (citing 20 U.S.C. § 1414(d)(1)(A)); *M.M. ex rel. D.M. v. Sch. District of Greenville Cnty.*, 303 F.3d 523, 527 (4th Cir. 2002).

16. Neither the IDEA nor state regulations require that an FBA be conducted prior to development of any portion of an IEP. In fact, an FBA is required in only one circumstance: where an IEP team has determined that a child’s misconduct was a manifestation of his/her disability. *See* 34 C.F.R. 300.530(f).

17. The IDEA simply requires an IEP team to consider a student’s need for positive behavioral interventions and supports where a student’s behavior impedes his learning of that of others. 34 CFR 300.324(a)(2)(i). Thus, as long as the team considers behavioral strategies, the absence of an FBA does not render an IEP inappropriate. *See A.C. ex rel. M.C. v. Board of Educ. of the Chappaqua Central School Dist.*, 552 F.3d 165, 172 (2d Cir. 2009) (holding that the absence of an FBA, even where required by state regulations, did not render the IEP procedurally or substantively inadequate, because the IEP provided several strategies to address the student’s behavior); *W.S. Nyack Union Free School Dist.*, No. 09 Civ. 10139 (DAB), 2011 WL 1332188, \*10 (S.D.N.Y. Mar. 30, 2011) (holding that the IEP’s inclusion of positive reinforcement and verbal prompts as supplemental aids and services, couples with the decision of the IEP team to conduct an FBA in coming school year, rendered the IEP appropriate even though the FBA had not yet been conducted).

18. While not dispositive, evidence of actual progress (or the lack thereof) is relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit." *M.S. ex rel. Simchick*, 553 F.3d 315, 326-27 (4<sup>th</sup> Cir. 2009).

19. Once a school has formulated a procedurally proper IEP, a reviewing court should be reluctant to second-guess the judgment of educational professionals, and neither parents nor courts have a right to compel a school district to employ a specific methodology in educating a student. *See Rowley*, 458 U.S. at 206-08.

20. So long as an IEP offers a "basic floor of opportunity that access to special education and related services provides," courts should defer to educators' determination of IEP appropriateness. *Tice v. Botecourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990) (quoting *Rowley*, 458 U.S. at 201).

### **Professional Judgment and Deference to Educators**

21. The professional judgment of teachers and other school staff is a critical factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann*, 118 F.3d at 1001. *See also Rowley*, 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *Lawson*, 354 F.3d at 328.

22. In addition, "a reviewing court should be reluctant indeed to second-guess the judgment of education professionals . . . we must defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990) (citations and quotation marks omitted).

23. The Undersigned must give deference to school board employees based on their "demonstrated knowledge and expertise of the agency with respect to the facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

24. The Undersigned acknowledges that she may not substitute her "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny. *Rowley*, 458 U. S., at 206. Where those educational decisions were *sound* and the educators "offered a cogent and responsive explanation" for their decisions, *Endrew F.*, 137 S. Ct. at 1002, the Undersigned afforded them deference. The Undersigned found that the educators offered a cogent and responsive explanation for their decisions regarding the provision of FAPE to [REDACTED]

## **CPI Holds and Physical Restraints**

25. In accordance with N.C.G.S. § 115-391.1(c)(1)-(c)(3), “Physical restraint of students by school personnel shall be considered a reasonable use of force ... (a) as reasonably needed to obtain possession of a weapon or other dangerous objects on a person or within the control of a person, (b) as reasonably needed to maintain order or prevent or break up a fight, (c) as reasonably needed for self-defense, (d) as reasonably needed to ensure the safety of any student, school employee, volunteer, or other person present, to teach a skill, to calm or comfort a student, or to prevent self-injurious behavior, (e) as reasonably needed to escort a student safely from one area to another, (f) if used as provided for in a student's IEP or Section 504 plan or behavior intervention plan, [or] (g) as reasonably needed to prevent imminent destruction to school or another person's property. [Otherwise] physical restraint of students shall not be considered a reasonable use of force, and its use is prohibited. Physical restraint shall not be considered a reasonable use of force when used solely as a disciplinary consequence.”

26. Although Petitioners disagreed with the IEP Team’s decisions to include CPI holds in the BSP, the restraints used in this case were pursuant to [REDACTED] IEP and attached BSP.

## **IEP Implementation**

27. “A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Houston Ind. School Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

28. “[T]he failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education,” but “the failure to implement a material or significant portion of the IEP can.” *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011) (the district’s provision of only seven of the 15 hours of ABA therapy required by the IEP, and evidence that neither the lead teacher nor the aides understood the teaching methods called for in the IEP constituted a material failure to implement); *see Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811 (9th Cir. 2007) (school’s provision of five hours of math instruction rather than 8-10 hours called for in the IEP constituted a material implementation failure, but the absence of social stories in one class and the misuse of those stories in another class did not constitute failure to implement the student’s behavior management plan); *Johnson v. District of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013) (Courts applying the significant-provision standard articulated in *Sumter* “have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.”) (*quoting Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

### **Appropriateness of Private School Placement**

29. Petitioners are entitled to reimbursement for their private program only if they can show both that the public school system's program denied [REDACTED] a FAPE and that the private program they chose was appropriate. *School Co. of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass.*, 471 U.S. 359, 370 (1985).

30. Although a private school's program is not scrutinized under the statutory requirements of FAPE, parents seeking reimbursement still must show that the private program provided an education otherwise proper under the IDEA. *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 12-13 (1993). A private program is proper under the IDEA where it is "reasonably calculated to enable the child to receive educational benefits." *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009).

31. Several factors bear on a court's determination as to appropriateness of a private placement under the IDEA, including: whether the private program provides the special education services needed by the student, and whether the student progressed behaviorally and/or educationally in the private program. *Berger v. Medina City Sch. Dist.*, 348 F.3d 512, 523 (6th Cir. 2003) (private placement where student enjoyed smaller class size and higher grades deemed inappropriate because none of the special education services needed were provided); *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 488 (4th Cir. 2011) (private placement deemed appropriate under IDEA where autistic student progressed educationally and behaviorally, was learning more, and was no longer engaging in problematic self-stimulating behaviors that occurred in public school).

### **Appropriateness of Compensatory Services**

32. As with reimbursement for the costs of private school, a parent-plaintiff seeking compensatory services must first establish that his child was denied a FAPE. *See G. ex rel R.G. v. Fort Bragg Dependent Schools*, at 309; *see also C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008) ("compensatory education is not an automatic entitlement; rather it is a discretionary remedy for nonfeasance or misfeasance in connection with the school system's obligations under the IDEA.").

33. If the parent succeeds in showing that his child has been denied a FAPE, then compensatory services may be appropriate. *Id.* "[C]ompensatory education involves discretionary, prospective relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure of a given period of time to provide a FAPE to a student." *G. ex rel R.G.*, 343 F.3d at 309.

34. The same standards governing a district's provision of FAPE govern as to the appropriateness of compensatory services. *See, e.g., Kelsey v. District of Columbia*, 85 F. Supp. 3d 327, 336 (D.C. Mar. 30, 2015) (affirming state hearing officer's discounting of expert opinion of plaintiff's expert, who suggested compensatory relief designed to maximize the student's

educational outcome, as opposed to the standard under the IDEA that would enable the child to receive educational benefits).

### **Limitation on Reimbursement and/or Compensatory Education**

35. Even if Respondent failed to provide a FAPE, the Undersigned may reduce or deny reimbursement “upon a judicial finding of unreasonableness with respect to the actions taken by the parents.” 34 C.F.R. § 300.148(d)(3).

36. “[O]nce a court holds that the public placement violated IDEA, it is authorized to ‘grant such relief as the court determines is appropriate.’ ” *Florence Cty Sch. Dist. 4 v. Carter*, 510 U.S. 7, at 15–16, 114 S.Ct. 361, at 366 (quoting 20 U.S.C. § 1415(e)(2)). ‘Under this provision, ‘equitable considerations are relevant in fashioning relief,’ and the court enjoys ‘broad discretion’ in so doing.” *Id.* at 16, 114 S.Ct. 361 (quoting *Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.” *Id.* A court may reduce or deny reimbursement upon a finding of “unreasonableness with respect to actions taken by the parents.” 20 U.S.C. § 1412(a)(10)(C)(iii)([REDACTED])

37. A parent’s interference with services that were or could have been provided by the district should factor into a court’s determination of appropriate compensatory services. *See Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F. 3d 1489, 1497 (9th Cir. 1994) (holding that “[t]he behavior of Student W’s parents is also relevant in fashioning equitable relief,” and affirming district court’s decision to limit compensatory services due to parents’ failure to request services when student re-enrolled in District and their decision to decline offers of summer school instruction).

38. The Undersigned finds and concludes that the actions taken by [REDACTED]’s parents were unreasonable such that they thwarted the collaborative process required of all parties in the IDEA.

### **ISSUES FOR DECISION**

**ISSUE 1: Whether the February 2 and February 25, 2016 IEPs were appropriate for [REDACTED] and if not, whether any such failure led to a denial of FAPE for [REDACTED] (“IEP Issue”).**

#### **Speech-language Evaluation**

39. The North Carolina Department of Public Instruction (“NCDPI”) established the specific assessments and screening that are required by school districts to determine a student’s eligibility for each of the 14 areas of eligibility recognized in the State of North Carolina. *See* NC 1503- 2.5 (d). For a student to qualify as eligible in the area of Autism, the District must conduct ten different screenings and evaluations, including a psychological evaluation and a “speech language



evaluation which includes, but is not limited to, measures of language semantics and pragmatics.” NC 1503-2.5(d)(1)(i)(H)-(I).

40. Based on the above Findings of Fact, the Board’s speech language evaluation of [REDACTED] included a pragmatic assessment and met NCDPI’s requirements that the diagnostic impressions were supported by the data and information contained in the assessments conducted.

41. Based on the above Conclusions of Law and related Findings of Fact, Petitioners did not meet their burden of showing that the speech language evaluation conducted by Respondent required the addition of an IEP goal in pragmatic language for [REDACTED]

42. Based on the above Conclusions of Law and related Findings of Fact, the absence of an IEP goal targeting pragmatic language did not render either of the IEPs developed for [REDACTED] inappropriate.

43. Based on the above Conclusions of Law and related Findings of Fact, Respondent appropriately evaluated [REDACTED]’s speech language skills including his pragmatic language.

#### **Functional Behavior Assessment**

44. Neither the IDEA nor state regulations require that an FBA be conducted prior to development of any portion of an IEP. Rather, an FBA is required only after an IEP team has determined that a child’s misconduct was a manifestation of his/her disability. *See* 34 C.F.R. 300.530(f).

45. Based on the above Conclusion of Law and Findings of Fact provided above, the absence of an FBA prior to the Board’s development of the February 2 or February 25 IEPs and BSPs did not render these plans inappropriate for [REDACTED]

#### **IEP Goal, BSP, Service Delivery, Supplemental Aids/Accommodations**

46. Based on the above Findings of Fact Petitioners failed to meet their burden of establishing by a preponderance of the evidence that the behavioral goal, service delivery, or supplemental services and accommodations were inappropriate for [REDACTED] or rendered [REDACTED] IEPs inappropriate.

47. To the extent Petitioners alleged at hearing that the February 2 IEP was deficient because it did not provide a one-on-one aide for [REDACTED] the Undersigned finds Petitioners did not show by a preponderance of the evidence that this support was necessary at that time. Moreover, based on the above Findings of Fact, the Undersigned finds that Petitioners failed to show how the absence of this accommodation in the February 2 IEP amounted to actual harm to [REDACTED] since one-on-one assistance was provided when [REDACTED] reenrolled from February 9 through February 24, 2016.

**ISSUE 2: Whether the Board failed to implement the February 2, 2016 and February 25, 2016 IEPs, and if so, whether any such failure denied [REDACTED] a FAPE (“Implementation Issue”).**

48. North Carolina law permits the use of restraints for several purposes, including to prevent a student from harming himself or others or causing property damage. N.C. Gen. Stat. § 115C-391.1.

49. An LEA can restrain a student pursuant to N.C.G.S. § 115C-391.1 whether or not restraints are included in a BSP or BIP. According to OCS, the use of restraint was a last resort. The Undersigned gives OCS staff deference to their determination of when a CPI hold was necessary and does not find that the CPI holds/physical restraints used were inappropriate such that a new IEP or difference methods must be utilized during the relevant period. See [REDACTED] *Ex. Rel. H.C. v. Craven County Board of Education*, No. 4:16-CV-282-BO, pg. 3 (E.D.N.C. August 14, 2017).

50. Based on the above Findings of Fact, Petitioners failed to establish by a preponderance of the evidence that any CPI hold/ physical restraint of [REDACTED] amounted to a failure to implement a material or significant portion of [REDACTED]’s IEPs or BSPs.

51. A district’s failure to implement a “material or significant portion of the IEP” may amount to denial of FAPE. *Sumter*, 642 F.3d at 484.

52. Based on the above Findings of Fact, Petitioners failed to meet their burden of demonstrating that the Respondent failed to implement a material or significant portion of either the February 2 or February 25 IEPs or related BSPs.

53. Based on the above Findings of Fact, Petitioners also failed to establish by a preponderance of the evidence that any purported failure to implement the BSPs, IEPs, or other instructional strategies harmed [REDACTED].

54. Moreover, based on the Conclusions of Law and Findings of Fact, Petitioners have failed to meet their burden of proving that the Respondent denied [REDACTED] a FAPE.

**ISSUE 3: If Respondent did deny [REDACTED] a FAPE in 1 or 2 above, whether [REDACTED] is a placement reasonably calculated to provide educational benefit for [REDACTED] that supports an award of tuition and travel reimbursement (“Private School Issue”).**

55. Because the Undersigned concludes that the Respondent did not deny [REDACTED] a FAPE, a decision on this issue is not required.

56. Nonetheless, to the extent conclusions on this issue may be necessary to support review of the Final Decision, the Undersigned will make certain provisional conclusions on this issue.

57. Despite the considerable testimony demonstrating the deficits of the [REDACTED] program for [REDACTED] Petitioners ask this Tribunal to find that [REDACTED] improved [REDACTED]'s behaviors and was an appropriate parental private placement.

58. Petitioners contend that "[w]hile not perfect, [REDACTED] provided both benefit and healing from the behaviors engaged in while at [REDACTED] Pet. Prop. Dec. Concl. of Law # 47, p. 52. The Undersigned disagrees.

59. Based on the above Findings of Fact, Petitioners did not establish by a preponderance of the evidence that [REDACTED] made academic or behavioral progress at [REDACTED]

60. Based on the above Findings of Fact, Petitioners did not meet their burden of showing that the program provided to [REDACTED] at [REDACTED] was reasonably calculated to enable him to receive educational benefit.

61. As to the "healing" provided by [REDACTED] Petitioners did not offer any expert opinion from a psychologist or psychiatrist that [REDACTED] suffered any psychological harm while at [REDACTED] or [REDACTED] Moreover, according to the staff at [REDACTED] [REDACTED]'s maladaptive behaviors have continued and not abated at [REDACTED]

62. Based on the above Conclusions of Law and related Findings of Fact, Petitioners have not met their burden of establishing that [REDACTED] was an appropriate parental private placement for [REDACTED]

63. Moreover, even if Petitioners had [REDACTED] on this issue, because of the unreasonableness of their actions, the Undersigned would have denied reimbursement.

**ISSUE 4: If Respondent did deny [REDACTED] a FAPE in 1 or 2 above, whether an award of compensatory education is appropriate ("Compensatory Education Issue").**

64. This issue pertains to the parents' request that this Tribunal award them three years of compensatory education to compensate [REDACTED] for his alleged denial of FAPE by the Respondent. Third Petition, Prayer for Relief, ¶ 1.

65. Because the Undersigned concludes that the Board did not deny [REDACTED] a FAPE, a decision on this issue is not required. Nonetheless, to the extent conclusions on this issue may be necessary to support review of this Final Decision, the Undersigned will make certain provisional conclusions on this issue.

66. Petitioners failed to establish that the three years of compensatory services they request is reasonably linked to their allegations the [REDACTED] was denied a FAPE during less than two months of his attendance at [REDACTED] Likewise, Petitioners failed to establish that [REDACTED] required compensatory pragmatic language services because of a denial of FAPE when Respondent offered daily social skills training most of which [REDACTED] missed because of his absenteeism.

67. Petitioners failed to prove by a preponderance of evidence that [REDACTED]'s lack of behavioral progress was caused by a denial of FAPE.

68. [REDACTED]'s sporadic attendance interfered with the implementation of [REDACTED] IEPs and BSPs and with data collection necessary to develop a FBA.

69. Based on the above Findings of Fact, the weight of evidence also demonstrates that [REDACTED]'s parents did at times interfere with the services provided by Respondent, ultimately cancelled the FBA meeting, and ignored repeated requests to participate in the FBA meeting.

70. Petitioners' repeated allegations of abuse against school staff alienated the parties such that collaboration at the IEP meetings and provision of special education were significantly impeded.

71. Even if Respondent had denied [REDACTED] a FAPE, [REDACTED] absenteeism and [REDACTED] parents' unreasonable actions would warrant denial of compensatory education.

### **Other Issues**

72. As noted earlier, events prior to the special education referral on November 5, 2015 and after the end of Petitioners' claim are not before the Undersigned, and do not form the basis for the Conclusions of Law in this Order.

73. This Tribunal has no jurisdiction over personal injury claims, abuse claims, criminal assault allegations and any claims not pertaining to the provision of a free and appropriate public education pursuant to the IDEA, its supporting regulations, N.C.G.S. 115C-106 *et seq.*, and the corresponding state regulations. Stips. 6, 7, & 9. Any such claims are not before the Undersigned and neither the Findings of Fact nor the Conclusions of Law in this Final Decision are pertinent to those claims.

74. The above described issues, and any other that were not specifically and properly pled in the Petitions, are not before the Undersigned in this Final Decision and will have no further part in this decision.

75. To the extent that this Final Decision does not expressly rule on any other claims raised in the Petitions, the Undersigned concludes that Petitioners did not meet their evidentiary burden to establish any right to relief on those claims.

**THEREFORE**, the Undersigned finds and holds that there is sufficient evidence in the records to properly and lawfully support the Conclusions of Law cited above.

### **FINAL DECISION**

**BASED** upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that:

1. Petitioners failed to meet their burden of proof by a preponderance of the evidence that Respondent failed to provide [REDACTED] a free appropriate public education for the 2015-2016 school year;
2. Petitioners' claims for private school reimbursement, related transportation expenses, and compensatory education are **DISMISSED WITH PREJUDICE**.
3. Any and all of Petitioners' remaining claims are **DISMISSED WITH PREJUDICE**.
4. Respondent is [REDACTED] party on all issues and claims.

**IT IS SO ORDERED.**

### **NOTICE**

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review

Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section.”

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

This the 15th day of November, 2017.

**B**

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Stacey Bice Bawtinheimer  
Administrative Law Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 15th day of November, 2017.

**L G**

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